DISTRICT COURT DEPARTMENT OF THE TRIAL COURT

STANDARDS OF JUDICIAL PRACTICE

INQUEST PROCEEDINGS

Committee on Standards

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Administrative Office of the District Court

District Court Department of the Trial Court

ADMINISTRATIVE REGULATION

No. 2-90

Subject: PROMULGATION OF STANDARDS OF JUDICIAL PRACTICE

Administrative Regulation No. 2-90 is hereby promulgated as follows, to be effective forthwith:

The provisions of the Standards of Judicial Practice applicable to Inquest Proceedings are promulgated herewith for use in the District Court.

Samuel E. Zoll

SAMUEL E. ZOLL
Chief Justice
District Court

Promulgated: July 24, 1990

Note:

To the District Court judge, inquest jurisdiction represents a challenge both in terms of the unique nature of the proceedings and the special public scrutiny often attending the incidents at issue. At the same time, this area of law is marked by a somewhat confusing statutory scheme, no applicable procedural rules, and a dearth of case law and scholarly analysis. Thus, I am pleased to promulgate this volume of District Court standards as a source of guidance and information on this difficult and sensitive topic.

The unique character of the inquest procedure focuses on the investigatory role of the judge, and the fact that unlike virtually every other proceeding over which District Court judges preside, inquests are not adversarial. It is the judge who must control the procedure and ensure that all the relevant information is produced. The facts do not emerge from a clash of adversaries as they argue their cases and probe the weaknesses of their opponent's evidence. Rather, the judge is given the task of seeking out the relevant testimony and rejecting the irrelevant.

The role of the judge as investigator can be an awkward one and must be fulfilled in a context where, in most cases, the initiative in presenting evidence will be taken by the District Attorney. The Standards seek to clarify the judge's role and the various duties involved, while at the same time recognizing the role of the District Attorney.

Similarly, the standards address the practical problems presented in inquests, such as obtaining the necessary documents, scheduling hearings and sequestration of witnesses. The important legal issues are analyzed: for example, who may attend the inquest, who may not; what papers must be impounded and for how long; how the proceedings should be recorded; etc.

I am sure that the standards will provide significant assistance not only to the District Court judges assigned to these important cases, but also to all those who become involved in them. I want to thank the Committee on Standards for another contribution to the improvement of the quality of District Court practice and procedure. Thanks also to John Connors who served as staff to the Committee, once again exhibiting his outstanding analytical and drafting skills. Additional thanks are due to the Attorney General of the Commonwealth, the District Attorneys of the Commonwealth, and the Chief Medical Examiner for the Commonwealth, who offered constructive suggestions on drafts of the standards sent to them for review.

While not mandatory in application in the sense of rules, the Standards of Judicial Practice represent the qualitative consensus reached by the Committee on Standards as to the various aspects of inquest procedures. As such, each court should strive for compliance with the standards and should treat them as a statement of desirable practice which should be departed from only with good reason. References are made throughout the standards to provisions of statutory and case law, which, of course, must be observed.

The standards may be amended from time to time. Your comments and suggestions on how they may be improved and on particular practices which should be recommended therein should be sent to the Administrative Office.

INQUEST PROCEEDINGS

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1:00 In General. **THE INQUEST IS A PROCEDURE WHOSE FORM AND PURPOSE IS UNIQUE TO DISTRICT COURT JURISDICTION. AS MORE SPECIFICALLY ANALYZED IN THE NEXT STANDARD, THE INQUEST IS A PROCEDURE BY WHICH THE COURT INVESTIGATES THE CIRCUMSTANCES OF A DEATH AND ISSUES A REPORT SETTING FORTH ITS CONCLUSIONS ON SEVERAL SPECIFIC ISSUES.**

INQUESTS, BY THEIR NATURE, OFTEN INVOLVE MATTERS OF HEIGHTENED PUBLIC CONCERN. ACCORDINGLY, THEY SHOULD BE CONDUCTED WITHOUT UNREASONABLE DELAY AND WITH PARTICULAR SENSITIVITY TO THE REQUIREMENTS OF THE LAW REGARDING PRIVACY AND PROPER PROCEDURE.

COMMENTARY

The inquest is a procedure of ancient origin. As a procedure in which the court, as opposed to an agency of the Executive Branch, is responsible to make an investigation, it is unique. While governed by a number of statutory provisions and several cases, inquest procedures are marked by a number of issues that remain unresolved. The purpose of these Standards is to analyze the requirements of applicable law and recommend solutions to procedural questions that can arise, so as to provide a ready reference to District Court judges called on to conduct these proceedings.

Inquests are infrequent. They have actually declined somewhat in number over recent years (1988-14; 1987-12; 1986-13; 1985-13; 1984-16; 1983-18; 1982-27; 1981-27). One reason for this may be that the investigation of a possible crime is usually best accomplished by the police and prosecution, rather than by a judge. There would appear to be nothing about an inquest that is inherently more effective than a thorough, professional investigation by appropriate officials of the Executive Branch. Since the District Attorney (or Attorney General) must make the decision on prosecution in any event (see Standard 5:00), the question arises as to whether the inquest is an anachronism. In any event, the policies of the District Attorneys vary as to when an inquest should be required. These policies and the extent to which a District Attorney investigates a matter prior to deciding

to require (or not require) an inquest is relevant to the court's independent decision on whether an inquest must be conducted. See Standards 2:01 and 2:02.

As a matter of background, it is useful to review the procedures required by statute that precede and give rise to an inquest. An understanding of these procedures can be relevant to resolving issues that arise during the inquest itself, especially issues regarding the content and completeness of the records and reports that should be before the court.

The procedures giving rise to an inquest are set out in some detail in G.L. c. 38, ss. 6, 6A, 6B and 7. Internal inconsistencies and other features in this statutory scheme reveal that it has been amended in a piecemeal fashion over the years. A summary of the procedures is as follows:

1. Notification to the county medical examiner. The inquest process starts with the requirement that under certain circumstances, any person who has knowledge of a death must notify the medical examiner of the county "wherein the body lies."

This notification requirement is triggered when "any person in the commonwealth is supposed to have died"

(1) by violence,

(2) by the action of chemical, thermal or electrical agents,

(3) following abortion,

(4) from diseases resulting from injury or infection relating to occupation,

(5) suddenly when not disabled by recognizable disease,

(6) from malnutrition,

(7) from sexual abuse,

(8) regarding children, when a child is determined to have been physically dependent upon an addictive drug at birth.

Finally, there is a ninth category of deaths that must be reported, namely, "when any person is found dead."

The person required to notify the medical examiner need not have actually seen the body: "[I]t shall be the duty of any person having knowledge of such death immediately to notify the medical examiner . . . ."

The notification must include the following information: "the known facts concerning the time, place, manner, circumstances, and cause of such death." Section 6 creates a specific crime for a physician who has knowledge of a death fitting the terms set out, but fails to notify the medical examiner.

2. Action by the medical examiner: Initial inquiry, examination and "record." Section 6 of G.L. c. 38 requires that the medical examiner receiving such a notification must (1) immediately inquire carefully into the cause and circumstances of the death and (2) take certain, specific actions:

a. He or she must immediately upon receipt of the notification "carefully inquire into the cause and circumstances of the death."

b. If he or she "is of the opinion that death may have resulted from violence or unnatural causes," the medical examiner is required to "go to the dead body and take charge of same." It has been held that the legislative intent is to insure a view by the medical examiner "in every doubtful case." Gahn v. Leary, 318 Mass. 425, 427, 61 N.E.2d 844, 846 (1945).

c. Upon taking charge of the body and before moving it, the medical examiner must "carefully note the appearance, and condition and position of the body and record every fact and circumstance tending to show the cause and manner of death with the names and addresses of all known witnesses." This record obviously is of great importance in a subsequent inquest.

One recurring problem is that the statute seems to presume that the body will not have been moved prior to the medical examiner being notified. Often, however, this is not the case. For example, the body may have been taken to a hospital and death not officially declared until arrival there.

3. Further examination by the medical examiner, notification of the District Attorney. After the medical examiner has viewed the dead body and made "personal inquiry" into the cause and manner

of death, he or she must decide whether further examination is necessary "in the public interest." G.L. c. 38, s. 6. If so, he or she must immediately notify the District Attorney of his or her intention to make such further examination. As will be noted, this "inquiry" will be of central significance to a subsequent inquest.

4. Duties of the District Attorney. Following "receipt of notification of death" the District Attorney "shall thereafter be the authority to direct and control the criminal investigation of the death and shall coordinate the criminal investigation with the police within whose jurisdiction the death occurred." The statute also requires that "the body shall not be moved, and the scene where the body is located shall not be disturbed until the District Attorney or his representative either arrives at the scene or gives direction as to what shall be done at the scene and for removal of the body." G.L. c. 38, s. 6.

Once again the statute seems to presume that the body will not have been moved from the place where it was originally found, this time before the District Attorney is notified. Moveover, it is not clear what notification triggers the District Attorney's obligation to act. The requirement that the District Attorney go to the scene or give direction as to what should be done at the scene and that he or she control the investigation is preceded in the statute only by a reference to the medical examiner's notice of the decision to make a further examination. After the District Attorney's required actions are set forth, the statute states that the "police shall forthwith notify the district attorney or his law enforcement representative of such death." It appears that this notification from the police triggers the District Attorney's required actions, even though it follows rather than precedes reference in the statute to those actions.

5. Autopsy. The provisions in the statute for an autopsy begin, "Such an autopsy . . . ." However, there is no prior discussion of an autopsy to which this language would appear to make reference. Apparently an earlier version of the statute had a portion, since dropped, which rendered the statement understandable. In any event, the statute goes on to require that the autopsy be performed in the presence of two or more "discreet" persons whose attendance the medical examiner may compel by subpoena. If the medical examiner considers it necessary to have a physician present as a witness (presumably as one of the two or more required), a fee of $15 is authorized. Other witnesses (except officers named in G.L. c. 262, s. 50) must be allowed $10.

The medical examiner is authorized to employ a clerk to record the results of "such a view or autopsy" (again, evidence of

internal confusion in the statute) for a fee of not more than $5 per day.

The statute, G.L. c. 38, s. 6, then goes on to state:

> Upon written order of the district attorney of the district where the body lies, or of the attorney general, a medical examiner shall also make, or cause to be made in his presence, an autopsy under like condition of any dead body within his county.

It appears that this is an alternative manner in which an autopsy can be held, i.e. at the direction of the district attorney as opposed to the discretion of the medical examiner.

The statute goes on to describe how the medical examiner may (or must) employ and pay a "pathologist, a chemist or other expert to aid in the examination of the body or of substances supposed to have caused or contributed to death. . . ."

Also, the medical examiner may request a member of the panel of pathologists established under G.L. c. 38, s. 1B, to perform the autopsy, and may consult the office of the chief medical examiner regarding his decision to conduct a "further examination" (the latter being a reference to the autopsy, most likely).

The medical examiner may also request the chief medical examiner for a "medicolegal" autopsy to be conducted as determined by the latter.

6. Autopsy Record. General Laws, c. 38, s. 6 requires that:

> The medical examiner shall, at the time of the autopsy, record or cause to be recorded each fact and circumstance tending to show the condition of the body and the cause and manner of death, with the names and addresses of [the] witnesses, which record he shall subscribe.

7. Special Requirement: Blood Sample in Motor Vehicle Deaths. There is a special requirement set forth in G.L. c. 38, s. 6A, that the medical examiner submit to the State Police Laboratory a sample of blood from the deceased, if he determines that the death "may have resulted from injuries sustained in a motor vehicle accident, and the deceased was the operator of the motor vehicle or a pedestrian sixteen years of age or older, and if the death occurred within four hours of the accident."

8. Medical Examiner's Report and Certificate. General Laws c. 38, s. 7, begins with the statement, "He shall forthwith file with the district attorney for his district a report of each autopsy and view and of his personal inquiries . . . ."

Apparently, the statute means forthwith after the conclusion of the autopsy.

The report must be accompanied by a "certificate" that, in the medical examiner's judgment, the manner and cause of death "could not be ascertained by view and inquiry and that an autopsy was necessary."

9. Notice to District Attorney and Court.

> If upon such view, personal inquiry or autopsy, the medical examiner is of opinion that the death may have been caused by the act or negligence of another, he shall at once notify the district attorney and a justice of a district court within whose jurisdiction the body was found if the place where found and the place of said act or negligence are within the same county, of [sic] if the latter place is unknown; otherwise, the district attorney and such a justice within whose district or jurisdiction the said act or negligence occurred. G.L. c. 38, s. 7.

This same statute goes on to require the medical examiner also to file with the District Attorney and the judge of the court, "an attested copy of the view and his personal inquiries and a copy of the record of the autopsy." Certain notifications by the medical examiner to other officials and departments are also required.

1:01 Nature and Purpose of the Inquest. **THE INQUEST IS AN INVESTIGATORY PROCEDURE. ITS PURPOSE IS TO PROVIDE A PROCESS FOR OBTAINING INFORMATION AS TO WHETHER A CRIME HAS BEEN COMMITTED.**

IT IS NOT A PROSECUTION, IT IS NOT A CRIMINAL PROCEDURE, AND IT IS NOT ADVERSARIAL. THERE ARE NO "PARTIES" TO AN INQUEST IN THE USUAL SENSE.

THE OBJECT OF AN INQUEST IS TO ELICIT EVIDENCE SUFFICIENT TO ENABLE THE COURT TO REACH CONCLUSIONS ON A NUMBER OF SPECIFIC POINTS, THOSE CONCLUSIONS TO BE SET FORTH IN A FORMAL WRITTEN REPORT.

COMMENTARY

The inquest as a procedure within District Court jurisdiction is over a century old, originating in 1877. St. 1877, c. 200. Prior to that time, inquests were conducted by coroners with juries of six persons. Kennedy v. Justice of the District Court of Dukes Co., 356 Mass. 367, 252 N.E.2d 201 (1969).

However, the purpose and character of the inquest has not changed. As stated in the Kennedy case:

> An inquest is not a prosecution of anybody. It is not a trial of anyone. The pertinent statutory provisions exemplify a public policy that the inquest serves as an aid in the achievement of justice by obtaining information as to whether a crime has been committed. Kennedy v. Justice of the District Court of Dukes County, 356 Mass. at 373.

The inquest proceedings are not accusatory and they should be regarded as investigatory. Kennedy v. Justice of the District Court of Dukes County, 356 Mass. at 376.

The investigative character of the inquest is the key to understanding the role of the judge and the manner in which the procedure should be conducted, as discussed in the Standards that follow.

1:02 The Judge's Role. **THE ROLE OF THE JUDGE CONDUCTING THE INQUEST IS INVESTIGATORY. WHILE THE DISTRICT ATTORNEY MAY ATTEND THE INQUEST AND EXAMINE WITNESSES AS OF RIGHT, THE JUDGE REMAINS RESPONSIBLE FOR SEEING THAT ALL RELEVANT EVIDENCE IS PRESENTED AND THAT ALL RELEVANT WITNESSES ARE HEARD.**

COMMENTARY

The judge conducting an inquest is in an unfamiliar role. In all other proceedings, the judge, although he or she may actively inquire into the matter, is essentially in the posture of an umpire, standing between two competing adversaries. The role in an inquest is fundamentally different. In fact, conducting an inquest had been held to be a "quasi-judicial" function. La Chapelle v. United Shoe Mach. Corp., 318 Mass. 166, 169, 61 N.E.2d 8 (1945), and cases cited. As such, it could be constitutionally assigned to either the judiciary or to administrative officers (as it once was, when it formerly was conducted by coroners).

Since the inquest is not adversarial in the usual sense, it follows that in order to fulfill the investigatory function, it is the judge's responsibility as investigator to see that all relevant testimony and other evidence is produced. There is no parallel in inquests to the tactical decisions in adversarial proceedings whereby either party, consistent with the rules of evidence, may decide for itself not to present certain evidence or arguments. The court must seek out and, where necessary, compel the presentation of, all evidence it determines relevant.

The conduct of the inquest is addressed in detail in Standards 3:00-3:11.

1:03 The Role of the District Attorney. **THE DISTRICT ATTORNEY HAS THE RIGHT TO REQUIRE AN INQUEST TO BE HELD, AND TO ATTEND THE INQUEST AND EXAMINE WITNESSES. HOWEVER, THE PRIMARY ROLE OF THE DISTRICT ATTORNEY AT AN INQUEST HEARING IS TO ASSIST THE COURT IN THE LATTER'S FULFILLMENT OF ITS INVESTIGATIVE RESPONSIBILITY. SINCE THE INQUEST IS NOT AN ADVERSARIAL PROCEEDING, THE COURT SHOULD INSURE THAT THE DISTRICT ATTORNEY REMAINS ESSENTIALLY NEUTRAL, AND NOT ACT AS THE PROPONENT OR OPPONENT OF ANY PARTICULAR PROPOSITION OR POINT OF VIEW.**

Commentary

The statute, G.L. c. 38, s. 8, states that the District Attorney may require an inquest to be held "in case of any death supposed to have been caused by external means." Whether an inquest is required by the court or by a District Attorney (see Standard 2:04), it is clear that the non-adversarial nature of the proceeding must be maintained. While it is appropriate for the District Attorney to "go forward" in terms of initiating the presentation of evidence, this Standard stresses the court's obligation to maintain the non-adversarial tone of the proceedings. Aside from the District Attorney's statutory right to examine witnesses, G.L. c. 38, s. 8 (which should be interpreted to include cross-examination), the manner in which the District Attorney proceeds appears to be a matter of the court's discretion. See Standard 3:08.

1:04 The Role of the Attorney General. **IT WOULD APPEAR THAT THE ATTORNEY GENERAL MAY APPEAR IN INQUESTS INSTEAD OF A DISTRICT ATTORNEY, AND THAT WHEN THE ATTORNEY GENERAL DOES SO APPEAR HIS OR HER ROLE IS THE SAME AS THAT PROVIDED IN THE LAW FOR THE DISTRICT ATTORNEY.**

THROUGHOUT THESE STANDARDS, REFERENCES TO DISTRICT ATTORNEY SHOULD BE READ TO INCLUDE THE ATTORNEY GENERAL.

COMMENTARY

In the statutes providing for inquests, G.L. c. 38, ss. 6-13, there are references to the Attorney General as well as to the District Attorneys. For example, G.L. c. 35, s. 6 states that the appropriate District Attorney or the Attorney General may order a medical examiner to conduct an autopsy, and section 8 empowers the Attorney General as well as the District Attorneys to require an inquest.

However, in most instances the powers accorded the District Attorneys are silent with regard to the Attorney General (e.g. there is no statutory role for the Attorney General regarding notification by the medical examiner prior to a "further examination" under G.L. c. 38, s. 6).

This standard takes the position that the Attorney General may act at any stage of an inquest in place of a District Attorney. This position is based on the legal status of the Attorney General, the references to that office in the statutes pertaining to inquests, and the "interchangeability" of the official duties of the Attorney General and the District Attorneys. G.L. c. 12, s. 27.

1:05 Procedural Rules. **THERE ARE NO PROCEDURAL RULES OF COURT APPLICABLE TO THE CONDUCT OF INQUESTS.**

SINCE THE PROCEEDINGS ARE NOT CRIMINAL, RULES OF CRIMINAL PROCEDURE ARE INAPPLICABLE. NOR ARE ANY CIVIL RULES OF PROCEDURE APPLICABLE, BY THEIR OWN TERMS.

COMMENTARY

The only guidance available on how inquests must or may proceed is that set forth in the statutes and the few relevant cases. These are discussed in the Standards that follow.

PRELIMINARY MATTERS

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2:01	Review of the Documents Filed
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2:03	Action if the Court Lacks Jurisdiction
2:04	Authority to Conduct an Inquest
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2:06	Preliminary Meeting with District Attorney
2:07	Obtaining Lists of Witnesses
2:08	Scheduling: Notice
2:09	Scheduling: Judicial Assignment
2:10	Court Appointment of Investigator

2:00 Receipt of Notice and Documents From the Medical Examiner. **THE LAW REQUIRES THAT IF A MEDICAL EXAMINER IS OF THE OPINION THAT A DEATH "MAY HAVE BEEN CAUSED BY THE ACT OR NEGLIGENCE OF ANOTHER," HE OR SHE MUST NOTIFY THE DISTRICT ATTORNEY AND A JUSTICE OF THE APPROPRIATE DISTRICT COURT, AND MUST FILE WITH EACH AN ATTESTED COPY OF THE VIEW TAKEN, HIS OR HER PERSONAL INQUIRIES AND A COPY OF THE RECORD OF THE AUTOPSY.**

NOTIFICATION TO, AND FILING OF THE REQUIRED DOCUMENTS WITH, THE DISTRICT ATTORNEY DOES NOT RELIEVE THE MEDICAL EXAMINER OF THE DUTY TO NOTIFY, AND FILE THOSE DOCUMENTS WITH, A DISTRICT COURT JUDGE.

COMMENTARY

The steps leading to an inquest involve action by the county medical examiner and the District Attorney. See commentary to Standard 1:00. The event which usually triggers an inquest is the medical examiner's decision, after a series of procedures, usually including an autopsy, that a death may have been caused "by the act or negligence of another." G.L. c. 38, s. 7. Such a decision then requires the medical examiner to notify the District Attorney and the court, and file with each an attested copy of the view taken, the personal inquiries, and the autopsy record.

The duty of the medical examiner to file the required documents with the court as well as the District Attorney appears to be one that is sometimes ignored. However, this is a statutory requirement, the importance of which is clear since the court is obliged to decide whether an inquest is needed, notwithstanding a decision by the District Attorney not to seek an inquest. See Standards 2:04 and 2:05.

It is recommended that the medical examiner's documents be directed to the Clerk-Magistrate consistent with the duties of the latter regarding recordation and custody of court filings. The Clerk-Magistrate should promptly notify the Presiding Justice of

the court upon receipt of the documents to help insure that the matter will proceed properly and without delay.

See Standard 2:02 regarding selection of the proper district court at which the medical examiner should file the required papers.

2:01 Review of the Documents Filed. **THE JUDGE CONDUCTING AN INQUEST SHOULD REVIEW THE NOTICE AND REQUIRED DOCUMENTS FILED BY THE MEDICAL EXAMINER FOR COMPLETENESS AND IN ORDER TO BECOME FAMILIAR WITH THEIR CONTENTS AND TO DETERMINE THAT THE COURT HAS JURISDICTION.**

COMMENTARY

When an inquest is based on a medical examiner's notice that he or she is of the opinion that the death may have been caused by the act or negligence of another and the other required documents (i.e. attested copy of the view and personal inquiries and a copy of the record of the autopsy--see Standard 2:00), the court should review these documents carefully in advance of the inquest hearing.

If such a notice and documents were filed with the District Attorney but not with the court, the court should obtain copies. These documents are central to the inquest's purpose.

Of course if the inquest is initiated by the District Attorney without a medical examiner's notification to the court or to the District Attorney, there may be no medical examiner's documents to obtain. In such cases, the court should inquire of the District Attorney as to the existence of these documents.

2:02 Court's Jurisdiction. **THE DISTRICT COURT HAS SUBJECT MATTER JURISDICTION OVER INQUESTS UNDER G.L. C. 38, S. 8.**

IN TERMS OF TERRITORIAL JURISDICTION, IT APPEARS THAT AN INQUEST MUST BE HELD IN THE DISTRICT COURT WHEREIN THE MEDICAL EXAMINER HAS FILED, OR SHOULD HAVE FILED, THE REQUIRED NOTICE AND PAPERS. (SEE STANDARD 2:00). THIS MUST BE THE COURT WITHIN WHOSE JURISDICTION THE BODY WAS FOUND, AS LONG AS THAT PLACE AND THE PLACE OF THE ALLEGED ACT OR NEGLIGENCE ARE IN THE SAME COUNTY OR THE LATTER IS UNKNOWN.

IF THE ALLEGED ACT OR NEGLIGENCE IS KNOWN TO HAVE OCCURRED IN A COUNTY DIFFERENT FROM THE ONE IN WHICH THE BODY WAS FOUND, THE MEDICAL EXAMINER'S NOTICE AND FILING MUST BE DIRECTED TO THE COURT WITHIN WHOSE JURISDICTION THE ACT OR NEGLIGENCE OCCURRED.

COMMENTARY

There is a problem regarding the court's territorial jurisdiction in inquests. The relevant statutes, G.L. c. 35, ss. 7 and 8, appear to set out the jurisdictional requirements only in terms of the court where the medical examiner properly files his or her notice and related documents. That filing is required to be (1) with the court within whose jurisdiction the body was found, if the place where found and the place of the act or negligence are within the same county or if the latter place is unknown, or (2) with the court within whose jurisdiction the act or negligence occurred, if that place and the place where the body was found are not within the same county. G.L. c. 38, s. 7. Under G.L. c. 38, s. 8, the court getting the filing in accordance with these requirements may thereupon conduct an inquest.

The problem is that this approach presumes that the medical examiner will, in fact, file with the court. To address the question of jurisdiction where the District Attorney requires an inquest but no filing has been made with the District Court, the Standard takes the position that, in such cases, jurisdiction

should be determined in terms of where the medical examiner should have filed. A similar approach is recommended where the District Attorney requires an inquest even though the medical examiner has failed or decided not to file a notice and related documents with him or her.

It should be noted that where a medical examiner files the notice and related documents in the "wrong" court, that court must conduct the inquest anyway if (1) the place where the body was found and the place where the supposed act or negligence occurred are both within 50 rods (275 yards) of that court's jurisdictional boundaries and both those places are in Massachusetts, and (2) no other medical examiner has filed a notice in a "proper" court.

2:03 Action if the Court Lacks Jurisdiction. **IF THE COURT CONCLUDES THAT IT LACKS JURISDICTION AND THE INQUEST HAS NOT YET COMMENCED, IT SHOULD DECLINE TO COMMENCE THE INQUEST ON THAT BASIS. IF THE INQUEST HAS COMMENCED, EITHER ON THE COURT'S OWN INITIATIVE OR AS REQUIRED BY A DISTRICT ATTORNEY, THE COURT SHOULD DISMISS THE INQUEST WITHOUT PREJUDICE. IN SUCH CASES THE COURT SHOULD RETURN TO THE MEDICAL EXAMINER THE DOCUMENTS FILED BY HIM OR HER, IF ANY.**

COMMENTARY

If the court determines that it lacks jurisdiction, it follows that it cannot take action in the case, or continue to hear it if proceedings have already commenced.

Even the statutory authorization for the District Attorney to "require" an inquest would imply that the inquest be conducted only in a court having proper jurisdiction.

Where an inquest must be dismissed for lack of jurisdiction, this would not prevent recommencing in the proper court. No double jeopardy restrictions apply because of the inquest's non-criminal character. One alternative to dismissal for lack of jurisdiction is to have the matter proceed as a session of the court where jurisdiction is proper, by authorization of the District Court Chief Justice under G.L. c. 218, s. 43A. Another alternative would be to "transfer" the case to a court that has jurisdiction. However, it is not clear whether any statutory basis exists for such a transfer.

In any event, recommencing an inquest in the proper court or proceeding under a s. 43A authorization may require a different District Attorney if the court with jurisdiction is in a different county.

Finally, if the issue of jurisdiction is raised and decided by the court, it would appear that the District Attorney and perhaps another "party" to the proceeding could appeal that decision under G.L. c. 211, s. 3. For that reason, a hearing should be held on the issue and the reasons for the court's decision set forth in writing.

2:04 Authority to Conduct an Inquest. **AFTER RECEIPT OF THE REQUIRED NOTICE AND DOCUMENTS, THE COURT MAY, AS A MATTER OF ITS DISCRETION, CONDUCT AN INQUEST. IN DECIDING WHETHER TO CONDUCT AN INQUEST, THE COURT SHOULD CONFER WITH THE DISTRICT ATTORNEY. HOWEVER, THE CONSENT OR APPROVAL OF THE DISTRICT ATTORNEY IS NOT NECESSARY.**

THE DISTRICT ATTORNEY MAY REQUIRE THE COURT TO CONDUCT AN INQUEST IN ANY CASE WHERE DEATH IS SUPPOSED TO HAVE BEEN CAUSED BY EXTERNAL MEANS, EVEN WHERE NO ACTION HAS BEEN TAKEN BY THE MEDICAL EXAMINER OR NO NOTIFICATION OR DOCUMENTS HAVE BEEN FILED BY THE MEDICAL EXAMINER WITH THE COURT.

COMMENTARY

By statute, G.L. c. 38, s. 8, the District Court judge who receives the required documents from the medical examiner is authorized to conduct an inquest. The District Attorney may, independent from the court's decision, require that an inquest be held "in the case of any death supposed to have been caused by external means". The meaning of this latter clause is not entirely clear.

In any event, the District Attorney can require an inquest even though no action has been taken by the medical examiner in terms of examining the body under G.L. c. 38, s. 6, and even though, having examined the body, the medical examiner has not given a notice to the District Attorney and District Court that in his opinion the death may have been caused by the act or negligence of another, as required by G.L. c. 38, s. 7.

Because the District Court and the District Attorney appear to have independent responsibility to decide on whether an inquest is to be conducted, it is recommended that after receiving and reviewing the required documents, the judge confer with the District Attorney. The court may wish to wait for the District Attorney's decision before making its own, because if the District Attorney decides that an inquest is necessary, the court's decision will be moot. See the next Standard.

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By statute, G.L. c. 38, s. 8, the District Court judge who receives the required documents from the medical examiner is authorized to conduct an inquest. The District Attorney may, independent from the court's decision, require that an inquest be held "in the case of any death supposed to have been caused by external means". The meaning of this latter clause is not entirely clear.

In any event, the District Attorney can require an inquest even though no action has been taken by the medical examiner in terms of examining the body under G.L. c. 38, s. 6, and even though, having examined the body, the medical examiner has not given a notice to the District Attorney and District Court that in his opinion the death may have been caused by the act or negligence of another, as required by G.L. c. 38, s. 7.

Because the District Court and the District Attorney appear to have independent responsibility to decide on whether an inquest is to be conducted, it is recommended that after receiving and reviewing the required documents, the judge confer with the District Attorney. The court may wish to wait for the District Attorney's decision before making its own, because if the District Attorney decides that an inquest is necessary, the court's decision will be moot. See the next Standard.

2:05 Court's Decision on Whether to Conduct an Inquest. **FOLLOWING RECEIPT OF THE MEDICAL EXAMINER'S NOTICE AND REQUIRED DOCUMENTS, THE COURT SHOULD CAREFULLY REVIEW THOSE DOCUMENTS TO DETERMINE WHETHER TO EXERCISE ITS DISCRETION TO CONDUCT AN INQUEST.**

AN INQUEST SHOULD BE CONDUCTED IF THE COURT HAS CAUSE TO INQUIRE AS TO WHETHER THE DEATH MAY HAVE RESULTED FROM THE UNLAWFUL ACT OR NEGLIGENCE OF ANOTHER, BASED ON THE INFORMATION FROM THE MEDICAL EXAMINER, i.e., THE VIEW, PERSONAL INQUIRIES AND RECORD OF THE AUTOPSY.

SINCE THE COURT'S DECISION AS TO WHETHER TO CONDUCT AN INQUEST WILL BE RENDERED MOOT IF THE DISTRICT ATTORNEY DECIDES TO REQUIRE AN INQUEST, THE COURT SHOULD CONFER WITH THE DISTRICT ATTORNEY, BEFORE CONSIDERING EXERCISE OF ITS DISCRETION.

IN MAKING ITS DECISION, THE COURT SHOULD GIVE WEIGHT TO A DECISION BY THE DISTRICT ATTORNEY NOT TO REQUIRE AN INQUEST, IF IT IS SATISFIED WITH THE BASIS FOR THAT DECISION.

IF THE DISTRICT ATTORNEY SEEKS AN INDICTMENT, THE COURT'S DECISION TO CONDUCT OR CONTINUE AN INQUEST SHOULD BE VIEWED AS A MATTER OF DISCRETION.

COMMENTARY

The medical examiner must send his or her notice and documents to the court as well as to the District Attorney when he or she "is of the opinion that the death may have been caused by the act or negligence of another." G.L. c. 38, s. 7. And the judge has independent authority upon receipt of such notice to conduct an inquest, apparently as a matter of discretion. G.L. c. 38, s. 8. While the law offers no explicit guidance as to the exercise of

that discretion, it follows from the nature of the notice and documents that an inquest should be held if the judge has a reasonable suspicion that the death may have been caused by the unlawful act of negligence of another. Since the function of an inquest is to determine the circumstances of the death and whether someone contributed to the death by an unlawful act or negligence (see Standard 4:00), it follows that if questions arise as to these matters, an inquest should be held.

It is appropriate for the court to confer with the District Attorney before making a decision whether to require an inquest. If the District Attorney will require one, the court's decision is moot. If the District Attorney has no intention of requiring an inquest, this decision may be relevant to the court's decision, depending on the basis for the former. If the District Attorney's decision is based on a thorough investigation, the conclusions reached in that investigation will be relevant to the court's decision.

If the District Attorney decides to seek an indictment in the matter, the court must consider this in making its decision to conduct an inquest. While an inquest and the seeking of an indictment are not mutually exclusive, the return of an indictment will usually render the inquest moot.

2:06 Preliminary Meeting with District Attorney. **THE COURT SHOULD CONSIDER MEETING WITH THE DISTRICT ATTORNEY PRELIMINARILY TO DISCUSS EITHER THE DECISION TO CONDUCT AN INQUEST OR INQUEST PROCEDURES, OR BOTH.**

SUCH A MEETING SHOULD BE HELD IN CAMERA OR IN THE COURTROOM, WITH THE SAME PRIVACY RESTRICTIONS AS ARE APPLICABLE TO THE INQUEST ITSELF. IN EITHER CASE, THE MEETING SHOULD BE ON THE RECORD.

COMMENTARY

While an inquest is not an accusatory or adversarial procedure, it clearly involves the determination of important legal issues that can affect the rights and interests of many individuals, including anyone who may be considered the "focus" of the inquest and the family of the deceased. For this reason, private ex parte discussions should be avoided.

However, a preliminary discussion with the District Attorney may be necessary. For example, the court may need information on the identity and addresses of persons who have a right to attend the inquest so that notices can be sent. Such discussions should proceed on the record, whether in the courtroom on in camera, in order to avoid even the appearance of inappropriate contact.

The record of any preliminary meeting and the documents from the medical examiner in the possession of the court would be covered by the general impoundment requirement applicable to inquests, should an inquest be conducted. See Standard 4:03. If no inquest were conducted following a preliminary meeting, the record of the meeting and any documents in the possession of the court could be subject to impoundment under Rule VIII of the Trial Court during the duration of any criminal proceedings.

2:07 Obtaining Lists of Witnesses. **BEFORE COMMENCING THE INQUEST HEARING, THE JUDGE SHOULD OBTAIN FROM THE DISTRICT ATTORNEY, AND FROM COUNSEL FOR ANY PERSON WHO MAY BE CONSIDERED THE POTENTIAL "FOCUS" OF THE INVESTIGATION, A LIST OF ALL WITNESSES WHO MAY BE OFFERED AND THE ORDER IN WHICH THEY WILL BE OFFERED.**

COMMENTARY

In order to proceed in a proper fashion, the court should know the names of the witnesses who will be called. This approach has three benefits: (1) it will compel the District Attorney and counsel for the person who is the focus of the investigation (and perhaps others, e.g., counsel for the family of the deceased) to identify those witnesses in advance, (2) it will allow the court to review the number of witnesses and thus gauge the likely length and scope of the proceeding, and (3) it will allow the court to identify any persons who are not on the lists but whose testimony may be relevant, or who are on the lists but whose testimony will not be relevant.

Because counsel for the person who is the likely focus of the investigation may not be known prior to the opening of the inquest hearing, it may be necessary to wait until that time to require the submission of lists of proposed witnesses, and to continue the matter for that purpose.

In some cases, the question of who is the "focus" of the investigation is clear, for example, where it is uncontested that a particular police officer or other known individual has caused the death in question. In other cases, the issue of whether a particular person is the focus of the investigation will be a delicate matter. The court should allow counsel for such a person to come forward, and should not express any opinion as to who may or may not be the focus of the investigation.

2:08 Scheduling: Notice. WHEN IT HAS BEEN DETERMINED BY THE COURT OR BY THE DISTRICT ATTORNEY THAT AN INQUEST WILL BE CONDUCTED, THE COURT MUST SCHEDULE THE INQUEST AND MUST SEND "SEASONABLE" NOTICE TO THE FOLLOWING PERSONS:

- ANY PARENT, SPOUSE, OR OTHER MEMBER OF THE DECEASED'S IMMEDIATE FAMILY, THE DECEASED'S LEGAL REPRESENTATIVE OR LEGAL GUARDIAN.

- THE DEPARTMENT OF PUBLIC UTILITIES, IF THE DEATH OCCURRED UPON A RAILROAD, ELECTRIC RAILROAD, STREET RAILWAY, OR RAILROAD FOR PRIVATE USE, AND IN ANY CASE IN WHICH A MOTOR VEHICLE OF A COMMON CARRIER OF PASSENGERS FOR HIRE BY MOTOR VEHICLE IS INVOLVED.

- THE DEPARTMENT OF PUBLIC WORKS IN ANY CASE OF DEATH IN WHICH ANY MOTOR VEHICLE IS INVOLVED.

NOTICE SHOULD ALSO BE SENT TO ALL OTHER PERSONS WHO ARE DETERMINED TO HAVE A RIGHT TO ATTEND THE INQUEST. SEE STANDARD 3:02.

COMMENTARY

The specific notice requirements set forth in this Standard are required by statute, G.L. c. 38, s. 8. Regarding the first of these, the most appropriate interpretation would appear to be that notice must be sent to all of those listed, even though the disjunctive is used in the statute.

Regarding others who have a right to attend the inquest, (see Standard 3:02) but are not legally required to get notice, the Standard recommends that notice should be sent.

2:09 Scheduling: Judicial Assignment. **IF THE PRESIDING JUSTICE DETERMINES THAT NEITHER HE NOR SHE, NOR AN ASSOCIATE JUSTICE OF THE COURT, WILL BE ABLE TO CONDUCT THE INQUEST BECAUSE OF THE LIKELY LENGTH AND RESULTING IMPACT ON THE COURT'S REGULAR BUSINESS, THE PRESIDING JUSTICE SHOULD REQUEST THAT ANOTHER JUDGE BE SPECIALLY ASSIGNED BY THE REGIONAL ADMINISTRATIVE JUDGE, AND THE JUDGE ASSIGNED SHOULD BE GIVEN REASONABLE ADVANCE NOTICE.**

COMMENTARY

The Presiding Justice, through the Clerk-Magistrate, should be the one to whom the medical examiner sends the required notice and documents. See Standard 2:00. Consistent with his or her authority as the administrative head of the court, the Presiding Justice can then either take jurisdiction of the case and proceed to review the documents and conduct the inquest, if any, or refer the case to an Associate Justice of the court or a regularly sitting visiting judge. Often inquests can be lengthy and time consuming. Where it is determined that an inquest is likely to be particularly lengthy and as a result would seriously impair the court's ability to hear and dispose of its usual caseload in a reasonably prompt manner, the Presiding Justice should request that a judge be specially assigned by the Regional Administrative Judge.

An Associate Justice of the court or a regularly scheduled "visiting judge" should not be presented with the obligation to conduct a previously scheduled inquest with insufficient notice.

It should also be noted that under G.L. c. 218, s. 43A, the Chief Justice of the District Court can move the proceeding to any other court or location. Upon such a move, the case remains a case of the court at which it must be filed for jurisdictional purposes.

2:10 Court Appointment of Investigator. **BY LAW THE COURT IS AUTHORIZED TO APPOINT AN OFFICER TO INVESTIGATE THE CASE. SINCE IN AN INQUEST THE DUTY TO INVESTIGATE THE CASE IS THAT OF THE COURT, THE COURT SHOULD CONSIDER THE APPOINTMENT OF AN INVESTIGATOR WHENEVER IT DEEMS THIS POTENTIALLY HELPFUL IN DETERMINING ANY OF THE FACTS RELATING TO THE DEATH AT ISSUE.**

THE INVESTIGATOR MUST BE A POLICE OFFICER OR OTHER PERSON QUALIFIED TO SERVE CRIMINAL PROCESS. HE OR SHE SHOULD BE A DISINTERESTED PERSON. IN ADDITION TO INVESTIGATION, THE INVESTIGATOR MAY SUMMONS WITNESSES. (SEE STANDARD 3:04.)

THE INVESTIGATOR SHOULD BE COMPENSATED IN ACCORDANCE WITH THE LAW, UNDER SUCH PROCEDURES AS ARE SET FORTH BY THE CHIEF JUSTICE.

COMMENTARY

In most cases, the court will rely on the District Attorney to present the evidence at an inquest. However, the court is ultimately responsible for the investigation, and it is consistent with its role that it appoint its own investigator when that is deemed helpful or appropriate. The law expressly authorizes such appointments. G.L. c. 38, s. 10, reads as follows:

> **Appointment of Officer to Investigate.**
>
> Section 10. A district court about to hold an inquest may appoint an officer qualified to serve criminal process to investigate the case and to summon the witnesses, and may allow him additional compensation therefor, payable in like manner as the fees of officers in criminal cases.

This statute appears to empower the inquest judge to appoint a police officer to investigate the death in question. The reference to "additional compensation" appears to refer to compensation in addition to an officer's regular salary, as

provided for mileage and service of criminal process under G.L. c. 262.

It would appear that such an officer (perhaps most appropriately a detective) could take such an appointment in the nature of a paid detail. Care must be used in making such appointments to avoid any appearance of conflict of interest. One inherent problem with such an appointment is that it renders a member of the Executive Branch an agent of the Judicial Branch.

CONDUCT OF THE INQUEST HEARING

3:00 In General. **EXCEPT FOR THE REQUIRED EXCLUSION OF THE PUBLIC AND THE MEDIA, WITNESSES' RIGHT TO COUNSEL, AND THE RIGHTS OF THE DISTRICT ATTORNEY, THE CONDUCT OF AN INQUEST HEARING IS ESSENTIALLY A MATTER OF DISCRETION FOR THE PRESIDING JUDGE. NO STATUTORY OR CASE LAW PROVISIONS RESTRICT THAT DISCRETION. HOWEVER, THE JUDGE'S DISCRETION SHOULD BE EXERCISED IN A MANNER CONSISTENT WITH ORDERLY PROCEDURE AND WITH THE GOAL OF THE INQUEST, WHICH IS TO EFFECTIVELY INVESTIGATE THE DEATH SO AS TO DETERMINE THE INFORMATION SPECIFICALLY REQUIRED FOR THE INQUEST REPORT.**

COMMENTARY

The procedure to be followed at inquest hearings is expressly governed by specific legal requirements only with regard to who may attend and the rights of witnesses and the District Attorney. These requirements are examined in later standards. In other respects, "inquests shall be conducted in the sound discretion of the inquest judge in general in accordance with the principles already discussed above." Kennedy v. Justice of the District Court of Dukes Co., 356 Mass. 367, 377, 252 N.E.2d 201, 207 (1969). The "principles" referred to are the barring of public access and the rights of witnesses (see Standard 3:03 and Standards 3:07 through 3:08, respectively).

The Standards emphasize that proper exercise of the inquest judge's discretion should be guided by the need to proceed in an orderly fashion, i.e. to remain in control of the procedure so as to achieve its purpose, namely, to determine through investigation the information necessary for the resulting report: the "means" of death, the name of the deceased, "all material circumstances attending the death, and the name, if known, of any person whose unlawful act or negligence appears to have contributed thereto."

3:01 Setting the "Ground Rules." **AT THE OPENING OF THE INQUEST HEARING THE JUDGE SHOULD, AS A PRELIMINARY PROCEDURE, ANNOUNCE TO THE DISTRICT ATTORNEY AND COUNSEL AND OTHERS WHO WISH TO ATTEND, THE PROCEDURES TO BE FOLLOWED. THIS SHOULD INCLUDE THE PURPOSE OF THE INQUEST, THE ROLE OF THE JUDGE, NAMES OF WITNESSES, THE ORDER IN WHICH THEY WILL TESTIFY, THE ROLE OF COUNSEL FOR THE WITNESSES, THE NAMES OF THOSE WHO WILL BE ALLOWED TO ATTEND THE INQUEST, THE FACT THAT EVIDENCE WILL BE ADMITTED BASED ON ITS RELEVANCE IN THE DISCRETION OF THE COURT, AND ALL OTHER BASIC PROCEDURAL POINTS.**

COMMENTARY

Because of the wide procedural discretion of the inquest judge, it is useful to describe to those who will participate what the purpose of the inquest is, and what the procedures will be, and to resolve any legal or practical objections to those procedures at the outset.

Regarding the admission of evidence and examination of witnesses, see Standard 3:08.

3:02 Who May be Present at Inquest Hearing. **ANY PERSON AND HIS OR HER ATTORNEY HAVING AN INTEREST IN AN INQUEST MAY BE PRESENT DURING THE INQUEST HEARING.**

PERSONS HAVING AN INTEREST MUST BE DEEMED TO INCLUDE THE PARENTS, GUARDIAN AND NEXT OF KIN OF THE PERSON WHOSE DEATH IS THE SUBJECT OF THE INQUEST. THE COURT'S DETERMINATION OF WHETHER ANY OTHER PERSON "HAS AN INTEREST" AND THUS MUST BE ALLOWED TO BE PRESENT IS A MATTER OF DISCRETION. A PERSON WHO WILL BE CALLED AS A WITNESS DOES NOT NECESSARILY "HAVE AN INTEREST." THUS, WITNESSES MAY BE ALLOWED TO ATTEND ONLY INSOFAR AS IS NECESSARY FOR GIVING TESTIMONY.

THE DISTRICT ATTORNEY HAS A RIGHT TO BE PRESENT AT THE INQUEST HEARING, BUT HIS OR HER PRESENCE IS NOT A REQUIREMENT. IF NECESSARY, THE INQUEST HEARING MAY PROCEED WITHOUT THE DISTRICT ATTORNEY.

COMMENTARY

In light of the closure of the inquest to the public and the news media and the rationale for that decision (see next Standard), the statutory standard that persons and their attorneys who "have an interest in the inquest" may attend should be interpreted narrowly. The "interest" necessary to allow attendance should be a substantial one, not merely, for example, an indirect connection with the deceased or with the person who may be the focus of the investigation. Perhaps the best approach is for the court to require each such person to state his or her purported interest before deciding the issue.

Regarding persons who are defined by statute to have an interest, and who together with their attorneys are then entitled to attend, it should be noted that the statute refers to "the parents, guardian or next of kin." G.L. c. 38, s. 8. However, the

Standard reflects the interpretation that the provision be read inclusively and not in the alternative.

When an inquest hearing will extend over several days, the court may want to provide a court officer with a list of those whose attendance is permitted so as to insure that unauthorized persons are not admitted.

The District Attorney (or any person designated by him or her) is expressly authorized to attend under G.L. c. 38, s. 8. In the unlikely event that the District Attorney or a representative chooses not to attend, the Standard makes it clear that the hearing may nonetheless proceed.

3:03 Who Must be Excluded From Inquest Hearing. **THE PUBLIC AND THE NEWS MEDIA MUST BE EXCLUDED FROM THE INQUEST. THE PUBLIC SHOULD BE CONSTRUED TO INCLUDE ALL THOSE PERSONS DEEMED BY THE COURT NOT TO "HAVE AN INTEREST."**

COMMENTARY

One of the main rulings in the Kennedy case was that the public and the news media must be excluded from inquest hearings. This ruling went beyond the statute which indicates that the judge may close the hearing to persons who do not "have an interest" and who are not required by law to attend. The outright bar to the public and the news media announced in Kennedy was based on the need to ensure "a fair trial in any criminal proceedings which may follow the inquest." The court noted that "[a] public inquest also may tend to limit or delay the inquest investigation." Kennedy v. Justice of the District Court of Dukes Co., 356 Mass. 367, 376, 252 N.E.2d 20, 206 (1969).

3:04 Summoning Witnesses. **THE COURT MAY DETERMINE BEFORE THE HEARING COMMENCES THE WITNESSES TO BE CALLED. IF THE DISTRICT ATTORNEY OR ANY OTHER PERSON ATTENDING THE HEARING WISHES TO CALL WITNESSES, AND THE COURT AGREES, THOSE WITNESSES SHOULD BE SUMMONED. THE COURT SHOULD ALLOW ANY REQUESTED WITNESS TO BE SUMMONED IF IT IS DETERMINED BY THE COURT THAT WITNESS WILL CONTRIBUTE TO THE INVESTIGATION.**

DURING THE CONDUCT OF THE INQUEST HEARING, THE COURT MAY SUMMON ANY ADDITIONAL PERSON THE COURT DETERMINES MAY CONTRIBUTE TO THE INVESTIGATION.

WITNESSES SHOULD BE SUMMONED IN THE SAME MANNER AND BY USE OF THE SAME SUMMONS FORM AS IN CIVIL ACTIONS, WITH ANY APPROPRIATE MODIFICATIONS MADE IN THAT FORM.

COMMENTARY

Standard 2:07 discusses the need for the court to obtain lists of proposed witnesses in advance of the hearing. The above standard takes the position that in determining who should be allowed to testify, a liberal standard should be applied. Also, summonses should be issued to all witnesses to avoid ambiguity and possible delay in the proceedings.

It has been held that the medical examiner and other physicians can be called to testify as medical experts concerning observations made at an autopsy notwithstanding the fact that the autopsy was not conducted in compliance with G.L. c. 38, s. 6. Comm. v. Noxon, 319 Mass. 495, 543, 66 N.E.2d 814, 843 (1946).

3:05 Sequestration of Witnesses. **ALL WITNESSES WHO ARE NOT "INTERESTED PERSONS" MUST BE EXCLUDED FROM THE INQUEST HEARING. SEE STANDARD 3:03. WHERE APPROPRIATE, THESE WITNESSES SHOULD BE SEQUESTERED WHILE AT THE COURT WAITING TO TESTIFY, PREFERABLY IN A PRIVATE ROOM OR AREA. THE COURT SHOULD ALSO CONSIDER ORDERING THESE WITNESSES NOT TO DISCUSS THE CASE UNTIL THE REPORT BECOME PUBLIC.**

WITNESSES WHO ARE ENTITLED OR ALLOWED TO ATTEND THE HEARING CANNOT BE SEQUESTERED, BUT, WHEN APPROPRIATE, THE COURT SHOULD ORDER THEM NOT TO DISCUSS THE CASE WHILE AT THE COURT OR OTHERWISE UNTIL THE REPORT BECOMES PUBLIC.

COMMENTARY

The law expressly states that the witnesses "may be kept separate so that they cannot converse with each other until they have been examined." G.L. c. 38, s. 8. The value of sequestration is diminished if the witnesses are not precluded from discussing the case during the times when they are not kept separate at the court. This is particularly important in those proceedings that require more than one day. However, the constitutionality of such a "gag order" is not clear.

Witnesses who are interested persons have a right to attend the hearing and thus cannot be kept separate. For this reason the Standard urges that in addition to the sequestration of "non-interested" witnesses, those witnesses who attend the inquest might also be ordered not to discuss the case while it is pending. Once again, however, the constitutionality of such a gag order presents a question, even though the persons involved here can be considered to be analogous to parties in a criminal case.

3:06 Fifth Amendment Rights of Witnesses. **THE COURT SHOULD CAREFULLY EXPLAIN TO WITNESSES, IF IT APPEARS TO BE NECESSARY OR APPROPRIATE TO DO SO, THEIR PRIVILEGE AGAINST SELF-INCRIMINATION AS PROVIDED BY THE MASSACHUSETTS AND UNITED STATES CONSTITUTIONS. WHERE A WITNESS IS REPRESENTED BY COUNSEL, THE COURT MAY INQUIRE OF COUNSEL IF HE OR SHE IS SATISFIED THAT THE WITNESS UNDERSTANDS THIS PRIVILEGE, AND SHOULD ALLOW COUNSEL TO CONFER WITH THE WITNESS DURING TESTIMONY WHEN ISSUES OF THE PRIVILEGE ARISE.**

COMMENTARY

Given the purpose of the inquest, it is not uncommon for the Fifth Amendment privilege against self-incrimination to be implicated, especially when a person who may be the focus of the investigation testifies. But it is not required that the judge give an inquest witness Miranda warnings because neither the terms of the Miranda decision nor its rationale extends to an official investigation conducted in a judicial inquest. Labbe v. Berman, 62 F.2d 26 (1st Cir. 1980).

The statement in the Standard that the trial judge "should carefully explain to witnesses, if it appears necessary or appropriate to do so, their privilege not to incriminate themselves" is taken directly from Kennedy v. Justice of the District Court of Dukes Co., 356 Mass. 367, 375, 252 N.E.2d 201, 206 (1969). Where a witness is represented by counsel, the court can rely on counsel in this regard. However, the responsibility implied by the court can be a difficult one where a witness is not represented. In such cases the court may want to urge the witness to engage counsel. It is not clear whether the court has the authority to appoint counsel at public expense in such situations. However, it has been stated that such appointment of counsel in criminal cases is a "commendable practice" (with no reference made to whether or not the witness is indigent). Taylor v. Comm., 369 Mass. 183, 192, 338 N.E.2d 823, 829 (1975).

For the unrepresented witness, the explanation of the Fifth Amendment privilege can consist of cautioning him or her at the beginning of the testimony or at any point where incrimination might appear imminent that the witness is under no obligation to

give any information that might tend to incriminate him or her, that is, any information that could be used as evidence against him or her of having committed a crime.

3:07 Assistance of Counsel for Witnesses. **ALL WITNESSES MUST BE ALLOWED TO HAVE COUNSEL ACCOMPANY THEM AND ADVISE THEM DURING THEIR TESTIMONY. WITNESSES WHO "HAVE AN INTEREST IN THE PROCEEDINGS," AND ACCORDINGLY ARE ALLOWED TO ATTEND DURING THE INQUEST HEARING, MUST BE ALLOWED TO HAVE COUNSEL ATTEND WITH THEM. COUNSEL FOR WITNESSES DETERMINED NOT TO HAVE AN INTEREST MAY NOT ATTEND THE INQUEST OTHER THAN DURING THE TESTIMONY OF THEIR CLIENTS.**

SEE STANDARD 3:08 REGARDING PRESENTATION OF EVIDENCE AND CROSS-EXAMINATION BY COUNSEL.

COMMENTARY

The law ensures that all witnesses at inquest hearings "may be accompanied and advised by counsel while in attendance or testifying at an inquest." Kennedy v. Justice of the District Court of Dukes Co., 356 Mass. 367, 377, 252 N.E.2d 201, 207 (1969). As reflected in the Standard, witnesses who are not entitled to attend during the hearing except when they are testifying have a right to have counsel attend only while they are testifying. See Standard 3:02 regarding who may attend.

It should be noted, that "[t]here is, of course, some practical limit to the number of counsel who helpfully can participate in the same hearing at the same time." Kennedy v. Justice of the District Court of Dukes Co, 356 Mass. 367, 375, 252 N.E.2d 201, 206 (1969). This statement appears to imply that the court should exercise control as necessary to insure that involvement of counsel remains orderly.

3:08 Presentation of Evidence, Examination and Cross-Examination by Witnesses or Their Counsel. **IN GENERAL, EVIDENCE AT AN INQUEST SHOULD BE ADMITTED BASED ON ITS RELEVANCE AS DETERMINED BY THE COURT, AND GIVEN SUCH WEIGHT AS THE COURT DEEMS APPROPRIATE. NO WITNESS AT AN INQUEST MAY, AS OF RIGHT, PRESENT EVIDENCE, CALL AND EXAMINE WITNESSES, OR CROSS-EXAMINE OTHER WITNESSES DIRECTLY OR THROUGH COUNSEL. THE JUDGE MAY, AS A MATTER OF DISCRETION, PERMIT SUCH PRESENTATION OF EVIDENCE, EXAMINATION OR CROSS-EXAMINATION.**

THE COURT MAY PERMIT CROSS-EXAMINATION OR PRESENTATION OF EVIDENCE BY WITNESSES OR THEIR COUNSEL WHENEVER THIS WILL ASSIST THE COURT IN ITS INVESTIGATORY FUNCTION OR SERVE TO DIMINISH THE POSSIBILITY OF INJUSTICE OR AVOID INJURY TO REPUTATION.

OFFERS OF PROOF MAY BE REQUIRED AS A MEANS OF DETERMINING WHETHER TO ALLOW A WITNESS TO CROSS-EXAMINE OR PRESENT EVIDENCE, OR AS A METHOD OF AFFORDING WITNESSES THE OPPORTUNITY FOR AMPLIFICATION OR CORRECTION OF THEIR OWN TESTIMONY OR THAT OF OTHERS.

THE DISTRICT ATTORNEY MAY EXAMINE WITNESSES AS A MATTER OF STATUTORY RIGHT. SEE STANDARD 1:03 AND RELATED COMMENTARY.

THE COURT MAY FIND IT HELPFUL TO HEAR A SUMMARY OF THE EVIDENCE AT THE CONCLUSION OF THE HEARING.

COMMENTARY

There is no requirement that the rules of evidence be imposed in inquest hearings. The standards take the position that all relevant evidence be admitted and given appropriate weight. Thus, evidence that would be excluded as hearsay at a trial should be admitted at an inquest if relevant in the opinion of the court. Questions as to the reliability of evidence generally should relate to the weight it is given.

Regarding the presentation of testimony at an inquest, there are only two basic points: (1) the manner in which the testimony proceeds is largely a matter of the court's discretion, except for the District Attorney's right to examine witnesses, and (2) the procedure is not an adversarial one between parties, but rather an investigation for which the court is responsible.

Accordingly, the court must decide which witnesses will testify, how their testimony will be presented (i.e. will the court and the District Attorney question exclusively, will any witnesses' counsel be allowed direct examination, and will any witnesses or their counsel be allowed to cross-examine).

As the Standard points out, no one except the District Attorney has a right to present evidence or cross-examine at an inquest. Kennedy v. Justice of the District Court of Duke's Co., 356 Mass. 367, 374-375, 252 N.E.2d 201, 205 (1969) and cases cited.

According to the Kennedy case, the inquest judge "may permit cross-examination or the presentation of evidence by possible interested persons when it might be helpful . . . or might serve to diminish the possibility of injustice or to avoid injury to reputation." Kennedy 356 Mass. at 375.

The provision in the Standard regarding offers of proof is taken directly from the Kennedy case, 356 Mass. at 375.

3:09 Assistance of Counsel for Non-Witnesses. **A PERSON ENTITLED TO ATTEND AN INQUEST AS OF RIGHT MAY HAVE AN ATTORNEY ATTEND THE INQUEST, EVEN WHEN THAT PERSON WILL NOT TESTIFY. THE ROLE OF SUCH COUNSEL (FOR EXAMPLE, THE PRESENTATION OF EVIDENCE, EXAMINE AND CROSS-EXAMINATION OF WITNESS) SHALL BE A MATTER FOR THE DISCRETION OF THE COURT. THE COURT SHOULD EXERCISE CARE TO PROPERLY CONTROL THE INVOLVEMENT ALLOWED TO SUCH COUNSEL, IF ANY.**

COMMENTARY

The law provides that "[a]ny person or his attorney having an interest in the inquest may be present during the holding of such inquest...." Where such a person will be a witness, the attorney's role regarding that function is discussed in the previous Standard, 3:06. However where a person entitled to attend an inquest will not be a witness, the question arises as to what role (other than mere attendance) his or her counsel should have.

It would appear that the court may allow the attorney for such person to present evidence, examine or cross-examine witnesses, etc. However, the allowance of such involvement can pose problems. For example, if counsel for a family member of the deceased who will not be a witness is allowed to present evidence and examine witnesses, it may be difficult to deny that role to counsel for any other family member or any other "interested party."

Moreover, if such counsel is allowed, for example, to examine witnesses, it may become difficult for the court to properly limit questioning to the issues at hand. For instance, counsel for the employer of the person who is the "focus" of the inquest may be intent on getting statements relevant to the issue of civil negligence with an eye towards avoiding liability in a subsequent civil suit.

3:10 Recording the Proceedings. **ALL INQUESTS SHOULD BE ELECTRONICALLY RECORDED BY COURT-CONTROLLED AUDIO EQUIPMENT, PURSUANT TO RULE 211 OF THE SPECIAL RULES OF THE DISTRICT COURT. THE COURT SHOULD NOT ALLOW ANY PERSON ATTENDING THE INQUEST TO ELECTRONICALLY RECORD THE PROCEEDINGS.**

WHERE THERE IS ANY DOUBT THAT A COMPLETE TRANSCRIPT BASED ON THE ELECTRONIC RECORDING WILL BE ADEQUATE AND PROMPTLY AVAILABLE, THE COURT SHOULD APPOINT A STENOGRAPHER TO RECORD THE INQUEST PROCEEDINGS.

THE COURT SHOULD NOT PERMIT A PARTICIPANT TO EMPLOY HIS OR HER OWN STENOGRAPHER TO RECORD THE PROCEEDINGS.

THE COURT SHOULD TAKE CARE TO COMPLY WITH THE SPECIAL REQUIREMENTS OF G.L. C. 38, S. 11, WHERE THE DEATH AT ISSUE INVOLVES CERTAIN PUBLIC OR PRIVATE TRANSPORTATION.

COMMENTARY

Electronic recording of inquest proceedings with court controlled equipment is required under the terms of Rule 211 of the Special Rules of the District Court. A transcript from the tape recording should be obtained from one of the transcribers approved for that purpose by the Office of the Chief Administrative Justice.

Since inquest proceedings are closed to the public and the media, the court should not allow recording by anyone attending, because of the likelihood that the proceedings would thereby be publicly accessible. Nor is an audio copy of the tape or a copy of the official transcript available to the public until the entire matter is concluded. See Standard 4:04.

At the conclusion of the inquest, the court must transmit its report and a transcript of the evidence to the Superior Court. See Standard 4:02. If there is any question that an adequate transcript will not be promptly available at the conclusion of the

proceedings, the court should appoint a stenographer to make a record of the proceedings. The proceedings should be electronically recorded even when a stenographer is appointed.

If the court determines that an official stenographer should be appointed notwithstanding the requirement of a tape recording, it should be kept in mind that the stenographer will be paid by the court the approved daily rate, but will not be able to sell transcripts to the "parties" or anyone else during the period when the transcript will be impounded.

The court should not permit a participant to engage his or her own stenographer for several reasons. First, there should be only one "official" record of proceedings. Second, a privately obtained record would be difficult to control in terms of required confidentiality. Third, allowance of one participant's request for a private stenographer may result in requests by others, compounding the problems of confidentiality and discrepancies.

If the death in question involves public or private transportation, the court should review G.L. c. 38, s. 11, regarding its applicability and special requirements concerning the production and service of, and payment for, a report of the evidence aside from the record that must be sent to the Superior Court.

3:11 Taking a View. **THE COURT MAY DECIDE, AS A MATTER OF ITS DISCRETION, ON ITS OWN INITIATIVE OR UPON REQUEST OF A PARTICIPANT, TO TAKE A VIEW OF LAND, PREMISES OR ANY OBJECT RELEVANT TO THE INQUEST. SUCH A VIEW MAY BE TAKEN AT ANY TIME DURING THE INQUEST.**

THE PURPOSE OF SUCH A VIEW IS TO ASSIST THE JUDGE IN UNDERSTANDING THE EVIDENCE PRESENTED. ALL THOSE PERMITTED TO ATTEND AN INQUEST SHOULD BE ALLOWED TO ATTEND THE VIEW, PROVIDED THAT THE COURT MAY WANT TO SEQUESTER ONE OR MORE WITNESSES FROM THE VIEW. DURING THE VIEW ANY PERSONS OR THEIR COUNSEL MAY BE ALLOWED TO POINT OUT TO THE JUDGE WHAT SHOULD BE SEEN.

DEMONSTRATIONS DURING THE VIEW ARE A MATTER OF THE JUDGE'S DISCRETION.

COMMENTARY

There is no express authority for the court to conduct a view during an inquest, as there is in criminal cases. However, such authority should be implied as a means, where appropriate, of fulfilling the court's responsibility as fact finder.

Usually views should be conducted before evidence is taken. However, a view may become appropriate at any time. Before taking a view the court should announce for the record the place and any objects that will be viewed, and that information acquired on the may be used and considered in the court's deliberations.

The view should be supervised by court officers. The persons who are permitted to attend the inquest, through counsel where appropriate,, may point out essential features of the land, premises or objects being viewed, subject to judicial discretion and control.

The view should be recorded by a stenographer or portable electronic audio recording equipment.

THE INQUEST REPORT

4:00	Contents of the Report
4:01	The Issue of "Negligence" in the Inquest and Inquest Report
4:02	Filing of the Report and Transcript
4:03	Impoundment of the Inquest Documents at the District Court; Limited Access
4:04	Termination of Impoundment; Public Access to Inquest Documents

4:00 Contents of the Report. **AT THE CONCLUSION OF AN INQUEST, THE JUDGE MUST PREPARE A WRITTEN REPORT THAT PROVIDES THE FOLLOWING INFORMATION:**

1. **WHEN, WHERE AND BY WHAT MEANS THE DECEASED MET HIS OR HER DEATH;**

2. **THE NAME OF THE DECEASED, i.e. IF KNOWN;**

3. **ALL MATERIAL CIRCUMSTANCES ATTENDING THE DEATH; AND**

4. **THE NAME, IF KNOWN, OF ANY PERSON WHOSE UNLAWFUL ACT OR NEGLIGENCE APPEARS TO HAVE CONTRIBUTED THERETO.**

THE COURT'S CONCLUSIONS ON THESE FACTS SHOULD BE BASED ON THE PREPONDERANCE OF THE CREDIBLE EVIDENCE.

THE REPORT SHOULD EXPLAIN THE EVIDENTIARY BASIS FOR EACH OF THE COURT'S CONCLUSIONS, OR THE LACK OF EVIDENCE, AS THE CASE MAY BE, INCLUDING THE CREDIBILITY OF THE TESTIMONIAL EVIDENCE.

THE COURT SHOULD NOT MAKE "RECOMMENDATIONS" AS TO POSSIBLE PROSECUTION.

COMMENTARY

The contents of the inquest report as set forth in this Standard are expressly required by G.L. c. 38, s. 12. While the statute is written in terms of "facts" being reported (e.g. "when, where, and by what means the person met his death"), these facts

will represent the inquest judge's conclusions based on the evidence revealed at the hearing or otherwise.

The question arises as to what standard the court should employ in reaching its conclusions on the facts. Consistent with the nature and purpose of the inquest, it is recommended that the court base the conclusions it must set forth in the report on the non-criminal standard of preponderance of the credible evidence. Clearly, the court's conclusions do not have to meet the test of being beyond any reasonable doubt, that is, the criminal standard.

The standard takes the view that the report should not go beyond the statutorily mandated requirements. Since the procedure is investigatory and not accusatory (see Standard 1:01), the Standard takes the position that the report should not include any "recommendation" concerning whether prosecution should be sought. The decision whether to prosecute or not will be that of the District Attorney following the filing of the inquest report (see Standard 5:00). A recommendation on whether or not to prosecute in the report is not provided for by law and would be fundamentally inconsistent with the non-accusatory nature of the inquest.

4:01 The Issue of "Negligence" in the Inquest and Inquest Report. **THE INQUEST AND INQUEST REPORT SHOULD NOT ADDRESS THE ISSUE OF CIVIL NEGLIGENCE PER SE. "NEGLIGENCE" AS REFERRED TO IN G.L. C. 38, S. 12 SHOULD BE INTERPRETED TO REFER TO "CRIMINAL NEGLIGENCE." CRIMES OF "CRIMINAL NEGLIGENCE" INVOLVE ALL THOSE INVOLVING WANTON OR RECKLESS CONDUCT. ORDINARY NEGLIGENCE SHOULD BE ADDRESSED ONLY WHEN IT IS AN EXPRESS ELEMENT OF A CRIME.**

COMMENTARY

General Law c. 38, s. 12, states, in pertinent part (emphasis added):

> The magistrate shall report in writing . . . the name, if known, of any person whose unlawful act or negligence appears to have contributed [to the death of the deceased].

This reference to "negligence" is ambiguous. However, in light of the fact that the purpose of the inquest is to determine whether a crime may have been committed (see Standard 1:01), the Standard takes the position that the report (and thus the hearing itself) should not be concerned with civil negligence. Rather, the report and hearing should be concerned with negligence only in the criminal context. Thus the statute should be interpreted to refer to "unlawful act and [unlawful] negligence," indicating that all potential crimes should be covered in the inquest and report; not just those involving a person's deliberate acts, but also a person's inadvertent acts or failure to act.

This interpretation also has practical implications. Should the issue of civil negligence be considered a required topic of the inquest and the inquest report, the scope of the hearing and report would be significantly expanded to include issues and evidence unrelated to the commission of the crime. For example, testimony regarding "foreseeability" and "proximate causation" relate to civil negligence, but are not necessary in order to determine whether a crime was committed. Also, it should be kept in mind that, in many inquests, one or more of the participants may have an interest in a determination of civil negligence in the inquest report, since the report may be relevant to a civil suit for

monetary damages, even if no criminal action results. It is not the purpose of the inquest to resolve or facilitate the resolution of such issues.

It has been held that while there is no such thing as "criminal negligence" at the common law, that term was used to designate what is now known as "wanton or reckless conduct." Comm. v. Welansky, 316 Mass. 383 55, N.E.2d 902 (1944). Thus, crimes that include among their elements wanton or reckless conduct (including those involving the failure to act), should be considered to be the object of the "negligence" referred to in G.L. c. 38, s. 12.

The civil definition of negligence, i.e. "ordinary negligence," should come into play in an inquest only insofar as "negligence", rather than wanton or reckless conduct, is an express element of a crime. For example, motor vehicle homicide, resulting from negligence, G.L. c. 90, s. 24G, involves ordinary negligence as an element of this crime.

4:02 Filing of the Report and Transcript. **THE JUDGE MUST FILE THE INQUEST REPORT AND A TRANSCRIPT OF THE EVIDENCE RECEIVED BY HIM OR HER WITH THE SUPERIOR COURT FOR THE COUNTY IN WHICH THE INQUEST WAS HELD. THESE DOCUMENTS SHOULD BE SENT TO THE CLERK OF THE SUPERIOR COURT.**

THE COURT SHOULD BE VIGILANT REGARDING THE TIME TAKEN TO PREPARE THE TRANSCRIPT. IF UNDUE DELAY IS ENCOUNTERED, THE COURT SHOULD CONTACT THE TRANSCRIBER.

A COPY OF THE REPORT AND TRANSCRIPT SHOULD BE KEPT AT THE DISTRICT COURT.

COMMENTARY

Pursuant to G.L. c. 38, s. 12, and Kennedy v. Justice of the District Court of Dukes Co., 356 Mass. 367, 377-378, 252 N.E.2d 201, 207 (1969), the inquest judge is required to file the inquest report and transcript with the Superior Court. These documents should be filed with the Superior Court clerk. Kennedy v. Justice of the District Court of Dukes Co., supra. The District Court clerk should make the actual transmittal and should document that transmittal in the court docket. Copies of the report and transcript should be kept in the District Court file. The inquest judge may also want to keep a copy of the report.

4:03 Impoundment of the Inquest Documents at the District Court; Limited Access. **ALL DOCUMENTS RELATING TO THE INQUEST, INCLUDING THE COPY OF THE REPORT, COPY OF THE TRANSCRIPT, THE MEDICAL EXAMINER'S REPORT, AND EVIDENTIARY DOCUMENTS, MUST BE IMPOUNDED AT THE DISTRICT COURT.**

DURING THE PERIOD OF IMPOUNDMENT, ONLY TWO CATEGORIES OF PERSONS MAY HAVE ACCESS TO CERTAIN INQUEST DOCUMENTS:

(1) THE DISTRICT ATTORNEY INVOLVED IN THE INQUEST, THE ATTORNEY GENERAL, AND COUNSEL FOR ANY PERSON WHO HAS BEEN STATED IN THE REPORT AS HAVING ACTUAL OR POSSIBLE RESPONSIBILITY FOR THE DECEDENT'S DEATH HAVE A RIGHT OF ACCESS TO THE REPORT AND TRANSCRIPT.

(2) ANY INQUEST WITNESS MUST BE PERMITTED, THOROUGH COUNSEL OR DIRECTLY, TO CHECK THE ACCURACY OF THE TRANSCRIPT OF HIS OR HER OWN TESTIMONY AND TO FILE WITH THE INQUEST JUDGE AND THE SUPERIOR COURT CLERK ANY SUGGESTED CORRECTIONS.

SUCH ACCESS DOES NOT INVOLVE GIVING OR SELLING A COPY OF THE TRANSCRIPT TO THE REQUESTING PARTY. REQUESTS FOR SUCH ACCESS THAT ARE MADE AFTER THE REPORT AND TRANSCRIPT HAVE BEEN TRANSMITTED TO THE SUPERIOR COURT SHOULD BE REFERRED TO THAT COURT.

COMMENTARY

The contents of this Standard come directly from Kennedy v. Justice of the District Court of Dukes Co., 356 Mass. 367, 377-378, 252 N.E.2d 201, 207 (1969). Note that the list of those entitled to access to the transcript during the period of impoundment does not include persons who attended the inquest as "interested persons" but who did not testify as witnesses.

Once the District Court has completed the inquest, and the report and transcript have been officially transmitted to the Superior Court, requests for access to those documents should be decided upon by the Superior Court, since it is the court having custody of the original documents.

The Kennedy case is silent as to procedure to be followed if, in fact, a witness files a "suggested" correction of the transcript in both the District Court and Superior Court as required. One option would be for the inquest judge to review the matter, possibly with reference to the tape recording (see Standard 3:12), and order that changes be made in the transcript where appropriate. Any such amendment order would then be filed with the Superior Court, so that the required changes would be added to the transcript.

It should be noted that there is a special statutory provision regarding access to certain inquest documents to be provided by the District Attorney to the accused after indictment and arraignment in capital cases. G.L. c. 38, s. 7, last par.

Moreover, it has been ruled that the above described restrictions do not limit the use of the inquest transcript by the prosecution in the subsequent criminal case, if any, to refresh the recollection of a prosecution witness by letting that witness read the transcript. Comm. v. Dabrieo, 370 Mass. 728, 741-742, 352 N.E.2d 186, 194 (1976).

4:04 Termination of Impoundment; Public Access to Inquest Documents. **PUBLIC ACCESS TO THE INQUEST REPORT AND TRANSCRIPT MUST BE ALLOWED FORTHWITH UPON ORDER OF THE SUPERIOR COURT AND FOLLOWING THE OCCURRENCE OF ANY OF THE FOLLOWING:**

"(1) IF THE DISTRICT ATTORNEY FILES WITH THE SUPERIOR COURT CLERK A WRITTEN CERTIFICATE THAT NO PROSECUTION IS PROPOSED, OR

"(2) IF IT SHALL APPEAR THAT AN INDICTMENT HAS BEEN SOUGHT BUT NOT RETURNED, OR

"(3) IF A TRIAL OF THE PERSONS NAMED IN THE REPORT AS RESPONSIBLE FOR THE DECEDENT'S DEATH SHALL HAVE BEEN COMPLETED, OR

"(4) IF A JUDGE OF THE SUPERIOR COURT SHALL DETERMINE THAT NO CRIMINAL TRIAL IS LIKELY."

FOLLOWING THE SUPERIOR COURT ORDER REFERRED TO ABOVE, ANY OTHER INQUEST DOCUMENTS IN THE POSSESSION OF THE DISTRICT COURT, INCLUDING AUDIO COPIES OF THE ELECTRONIC RECORDING OF THE PROCEEDINGS, MAY BE OPENED TO PUBLIC ACCESS IN THE DISCRETION OF THE INQUEST JUDGE, OR A JUDGE OF THE DISTRICT COURT WHERE THE INQUEST WAS HELD IF THE INQUEST JUDGE IS NOT REASONABLY AVAILABLE.

BUT SUCH DISCRETION SHOULD BE GOVERNED BY THE PROCEDURES GOVERNING IMPOUNDMENT, TRIAL COURT RULE VIII, AND BY APPLICABLE CONSTITUTIONAL REQUIREMENTS GOVERNING PUBLIC ACCESS TO COURT RECORDS.

COMMENTARY

Public access to the inquest report and transcript is a matter of Superior Court determination and is described in Kennedy v. Justice of the District Court of Dukes Co., 356 Mass. 367, 377-378, 252 N.E.2d 201, 207 (1969). The Standard quotes the Kennedy case in this regard. It is not clear whether the required Superior Court order merely represents a determination that one of the four required events has occurred, or whether, despite its occurrence, the Superior Court could refuse to issue such order. In any event, it is a Superior Court decision.

Regarding inquest documents other than the report and transcript that are in the possession of the District Court, the Standard takes the position that those documents should not be made public before a Superior Court order making public the report and inquest, and that after such an order, public access is an issue for the District Court to decide, in accordance with the impoundment rules and applicable law.

CRIMINAL PROCEDURES

5:00 In General. **ONCE THE INQUEST REPORT AND TRANSCRIPT HAVE BEEN FILED, THE DECISION AS TO THE QUESTION OF PROSECUTION SHOULD BE LEFT TO THE DISTRICT ATTORNEY.**

COMMENTARY

The inquest is not a criminal proceeding and is not part of any criminal proceeding that may ensue. Kennedy v. Justice of District Court of Dukes Co., 356 Mass. 367, 374, 252 N.E.2d 201, 205 (1969).

Following the filing of the inquest report and transcript, it is for the District Attorney to determine as an exercise of his or her prosecutorial discretion whether to pursue the matter in a criminal prosecution.

Where the decision is made to prosecute, this is usually accomplished by seeking an indictment from a grand jury.

5:01 Issuance of Arrest Warrant After Inquest Report. **BY STATUTE, THE INQUEST JUDGE APPEARS TO BE REQUIRED FORTHWITH TO ISSUE AN ARREST WARRANT IF THE REPORT "CHARGES" A PERSON WITH THE COMMISSION OF A CRIME, AND THAT PERSON IS "AT LARGE."**

HOWEVER, IT APPEARS THAT THE REPORT WILL RARELY IF EVER SO CHARGE A PERSON. THUS, ARREST PROCESS GENERALLY SHOULD NOT BE ISSUED BY THE INQUEST JUDGE.

COMMENTARY

General Laws c. 38, s. 13, which predates the Kennedy case, reads as follows:

> If a person charged by the report with the commission of a crime is at large, the magistrate shall forthwith issue process for his arrest, returnable before any court or magistrate having jurisdiction . . . .

And case law, (again predating the Kennedy case) cites the above-quoted statute and indicates that "the investigating judge may himself issue process against a person whose probable guilt is disclosed. . . ." LaChapelle v. United States Shoe Machinery Corp., 318 Mass. 166, 169, 61 N.E.21 8, 10 (1945) (emphasis added).

However, the Kennedy case makes clear that the inquest is an investigatory rather than accusatory proceeding, and that "under statutes resembling our own, in order to initiate a criminal prosecution, there must be subsequent and independent criminal proceedings." Kennedy v. Justice of the District Court of Dukes Co., 356 Mass. 367, 374, 252 N.E.2d 201, 205 (1969).

It appears that the overall statutory scheme is for the inquest report to be followed, where appropriate, by an independent decision by the District Attorney to seek commencement of a criminal case either by seeking a grand jury indictment or a criminal complaint. (See next Standard.)

A single justice opinion seems to indicate that G.L. c. 38, s. 13 is still "good law" and that when the inquest judge issues process, he or she is thereby "initiating an independent, adjudicatory proceeding." Anthony J. Ruberto, Jr., District Attorney v. Central Berkshire Division of the District Court,

Supreme Judicial Court for Suffolk County, Wilkins, J. (No. 88-235, August 16, 1988). However, there is no procedural parallel for the issuance of criminal process by a judicial officer in Massachusetts without a hearing thereon. And the inquest hearing is not a hearing on the issuance of process.

In any event, the predicate of this difficult statute will rarely be met in technical terms. That is, the inquest report will rarely if ever "charge" a person with a crime. By statute, the report is only to state the facts surrounding the death and whether any persons "contributed" to the death by an illegal act or negligence. Thus section 13 by its own terms will not be implicated.

5:02 Application for Criminal Complaint Following an Inquest. **THE DISTRICT ATTORNEY MAY FILE AN APPLICATION FOR A CRIMINAL COMPLAINT FOLLOWING AN INQUEST. SUCH APPLICATION SHOULD BE PROCESSED IN THE USUAL COURSE. AT THE COMPLAINT HEARING, THE DISTRICT ATTORNEY MAY "PRESENT" A COPY OF THE INQUEST REPORT TO THE MAGISTRATE FOR SUCH EVIDENTIARY PURPOSES AS THE MAGISTRATE DEEMS APPROPRIATE.**

COMMENTARY

In a single justice opinion, it has been held that, following an inquest, the District Attorney has the option of either proceeding to seek a grand jury indictment or filing an application for a criminal complaint for the crime or crimes which are the subject of the report, if any. Anthony J. Ruberto, Jr., District Attorney v. Central Berkshire Division of the District Court, Supreme Judicial Court for Suffolk County, Wilkins, J. (No. 88-235, August 16, 1988). That case involved a crime within District Court final jurisdiction.

While the opinion in Ruberto indicates that the inquest report could be presented to the magistrate conducting the hearing on the application by the District Attorney, the evidentiary use of the report, if any, is a matter for the magistrate to decide. The rules of evidence do not apply at such hearings.

APPENDIX A

General Laws c. 38, ss. 5-20

38:5. Salaries; payment of expenses; fees.

Section 5. In Suffolk county the medical examiner and each associate medical examiner shall receive a salary in an amount to be determined by the commission on medico-legal investigation upon the recommendation of the chief medical examiner but such salary shall not be less than forty thousand dollars for said medical examiner and not less than twenty thousand dollars for such associate medical examiners.

Medical examiners and associate medical examiners in other counties shall receive fees set by the commission upon recommendation of the chief medical examiner, but not less than as follows: for a view without an autopsy, fifty dollars; for a view and attendance at an autopsy, one hundred dollars; for attendance as a witness at an inquest or as a witness in a criminal case in district court, the grand jury or in the superior court, one hundred dollars for each day of such attendance, and for travel related to investigations, attendance at autopsies or being a witness at an inquest or a criminal trial, the current rate per mile traveled as paid other employees of the commonwealth.

38:6. Duty to report deaths; penalty for failure to report; duties of examiner and office of chief medical examiner; provisions for autopsies; witness fees.

Section 6. When any person in the commonwealth is supposed to have died by violence or by the action of chemical, thermal or electrical agents or following abortion, or from diseases resulting from injury or infection relating to occupation, or suddenly when not disabled by recognizable disease, or from malnutrition, or from sexual abuse, or a child who is determined to be physically dependent upon an addictive drug at birth, or when any person is found dead, it shall be the duty of any person having knowledge of such death immediately to notify the medical examiner of the district of the county wherein the body lies of the known facts concerning the time, place, manner, circumstances, and cause of such death. A physician who, having knowledge of such a death, fails to notify the medical examiner shall be punished by a fine of not more than one hundred dollars. Immediately upon receipt of such notification, the medical examiner shall carefully inquire into the cause and circumstances of the death and if, as a result of such inquiry, he is of the opinion that death may have resulted from violence or unnatural causes, he shall go to the dead body and take charge of the same. Upon taking charge of the dead body and before moving the same the medical examiner shall carefully note the appearance, the condition and position of the body and record every fact and circumstance tending to show the cause and manner of death with the names and addresses of all known witnesses and subscribe the same and make such record a part of his report

as provided in section seven. If on view of the dead body and after personal inquiry into the cause and manner of death, the medical examiner considers a further examination necessary in the public interest, he shall immediately notify the district attorney of the district and county within whose jurisdiction the body lies of his intention to make such further examination. The body shall not be moved, and the scene where the body is located shall not be disturbed until the district attorney or his representative either arrives at the scene or gives directions as to what shall be done at the scene and for the removal of the body. The district attorney and his law enforcement representative, upon receipt of notification of the death, shall thereafter be the authority to direct and control the criminal investigation of the death and shall coordinate the criminal investigation with the police within whose jurisdiction the death occurred. The police shall forthwith notify the district attorney or his law enforcement representative of such death. Such an autopsy shall be performed in the presence of two or more discreet persons whose attendance the medical examiner may compel by subpoena. If a medical examiner considers it necessary to have a physician present as a witness at an autopsy, such physician shall receive a fee of fifteen dollars. Other witnesses, except officers named in section fifty of chapter two hundred sixty-two, shall be allowed ten dollars each. A clerk may be employed to record the results of such a view or autopsy and shall receive not more than five dollars per day therefor. Upon written order of the district attorney of the district where the body lies, or of the attorney general, a medical examiner shall also make, or cause to be made in his presence, an autopsy under like conditions of any dead body within his county. The medical examiner may on his own authority, and shall if so requested by the district attorney of the county where the body lies, employ the services of a pathologist, a chemist or other expert to aid in the examination of the body or of substances supposed to have caused or contributed to death, and if the aforesaid pathologist, chemist or other expert is not already employed by the commonwealth or by the city or county where the body lies for the discharge of such services he shall, upon written authorization of the medical examiner and of the district attorney, if such employment and services were requested by him, be allowed reasonable compensation, payable by the county in the manner provided in section nineteen. The medical examiner shall, at the time of the autopsy, record or cause to be recorded each fact and circumstance tending to show the condition of the body and the cause and manner of death, with the names and addresses of said witnesses, which record he shall subscribe. The medical examiner may allow reasonable compensation, payable by the county in the manner provided in section nineteen, for the transportation of such bodies as need to be moved to a place where they can be more satisfactorily examined,

and for the use of such quarters as may be needed for the performance of an autopsy.

The medical examiner may perform such autopsy himself or may request a member of the panel of pathologists established under section one B to perform such autopsy. The medical examiner may also consult the office of chief medical examiner regarding his decision to conduct a further investigation. He may make a request to the chief medical examiner for a medicolegal autopsy to be conducted as determined by the chief medical examiner.

38:6A. Duty to submit blood samples in cases of death resulting from motor vehicle accidents; statement; liability.

Section 6A. If, after making inquiry pursuant to section six, the medical examiner is of the opinion that death may have resulted from injuries sustained in a motor vehicle accident, and the death occurred within four hours of the accident, and the deceased was the operator of a motor vehicle or a pedestrian sixteen years of age or older, the medical examiner shall submit to the state police laboratory a sample of blood from the deceased in an amount sufficient for chemical analysis. The medical examiner shall submit a statement with such sample including, but not limited to, information as to whether the body was that of an operator or pedestrian, and the name, age and sex of the deceased if available. The medical examiner, acting in compliance with this section, shall not be civilly or criminally liable for such actions.

38:6B. Discovery of unmarked human skeletal remains; age and racial determination; site evaluation.

Section 6B. It shall be the duty of any person in the commonwealth who discovers unmarked human skeletal remains or who knowingly causes to disturb said remains through construction or agricultural activity, to immediately notify the medical examiner of the district of the county wherein the human skeletal remains are located. The medical examiner shall, pursuant to section six, conduct an inquiry to determine whether the remains are suspected of being one hundred years old or more, in which case he shall immediately notify the state archaeologist.

If, after making inquiry pursuant to section six, the medical examiner determines that skeletal remains are suspected of being one hundred years old or more, he shall notify the state archaeologist who shall determine if the skeletal remains are American Indian.

If the remains are deemed likely to be American Indian, the state archaeologist shall forthwith notify the commission on Indian affairs that a site evaluation will be made to determine if the place where said remains were found is an Indian burial site.

38:6C. Repealed, 1984, 189, Sec. 46.

38:7. Reports of circumstances surrounding deaths and autopsies.

Section 7. He shall forthwith file with the district attorney for his district a report of each autopsy and view and of his personal inquiries, with a certificate that, in his judgment, the manner and cause of death could not be ascertained by view and inquiry and that an autopsy was necessary. If the autopsy was requested or ordered by the district attorney as provided in section six, he shall so certify to the commissioners of the county where the same was held or, in Suffolk county, to the auditor of Boston. If upon such view, personal inquiry or autopsy, the medical examiner is of opinion that the death may have been caused by the act or negligence of another, he shall at once notify the district attorney and a justice of a district court within whose jurisdiction the body was found, if the place where found and the place of the said act or negligence are within the same county, of if the latter place is unknown; otherwise, the district attorney and such a justice within whose district or jurisdiction the said act or negligence occurred. He shall also file with the district attorney thus notified, and with the justice or in his court, an attested copy of the view and his personal inquiries and a copy of the record of the autopsy made as provided in section six. He shall in all cases forthwith certify to the town clerk or registrar in the place where the deceased died, and to the department of industrial accidents in cases where death, in his opinion, was caused by or related to the occupation of the deceased, and to the registrar of motor vehicles in cases where death, in his opinion, was caused by or related to the operation of a motor vehicle, his name and residence, if known; otherwise a description as full as may be, with the cause and manner of death.

In a capital case, after indictment and arraignment, and while the defendant is in custody or subject to the jurisdiction of the court, upon his request, a copy of the report of the view and inquiries and of the record of the autopsy shall be made available to him by the district attorney.

38:8. Inquest; notice of hearing; persons authorized to attend; exclusion of disinterested persons; examination of witnesses.

Section 8. The court or justice may thereupon hold an inquest. The attorney general or the district attorney may, notwithstanding the fact that no action has been taken by the medical examiner under section six, or that no notification that the death may have been caused by the act or negligence of another has been given to the court or justice under section seven, require an inquest to be held in case of any death supposed to have been caused by external means. The court or justice shall give seasonable notice of the time and place of the inquest to the department of public utilities, in any case of death by

accident upon a railroad, electric railroad, street railway, or railroad for private use, and in any case of death in which a motor vehicle of a common carrier of passengers for hire by motor vehicle is involved, and to the department of public works in any case of death in which any motor vehicle is involved. Such notice shall also be given to any parent, spouse, or other member of the deceased's immediate family or his legal representative or legal guardian. Any person or his attorney having an interest in the inquest may be present during the holding of such inquest and shall at the completion of the magistrate's report of said inquest have the right to examine said report. All other persons not required by law to attend may be excluded from the inquest; provided, however, that the parents, guardian or next of kin of the person whose death is the subject of the inquest shall be deemed to be an interested person. The district attorney or any person designated by him may attend the inquest and examine the witnesses, who may be kept separate so that they cannot converse with each other until they have been examined.

38:9. Jurisdiction.

Section 9. If it appears that the place where the supposed act or negligence occurred and the place where the body was found are both without the limits of the judicial district of the court notified by the medical examiner under section seven, the court shall nevertheless proceed with the inquest and have continuous and exclusive jurisdiction thereof if either place is within the commonwealth and within fifty rods of the boundary line of such district, unless a prior and like notice shall have been issued by a medical examiner in another county in accordance with said section.

38:10. Investigation.

Section 10. A district court about to hold an inquest may appoint an officer qualified to serve criminal process to investigate the case and to summon the witnesses, and may allow him additional compensation therefor, payable in like manner as the fees of officers in criminal cases.

38:11. Deaths involving carriers; reports.

Section 11. If a magistrate believes that an inquest to be held by him relates to the accidental death of a passenger or employee upon a railroad or electric railroad or a traveler upon a public or private way at a railroad crossing, or to an accidental death connected with the operation of a street railway or of a railroad for private use, or a motor vehicle for the carriage of passengers for hire under chapter one hundred and fifty-nine A, he shall cause a verbatim report of the evidence to be made and sworn to by the person making it; and the

report and the bill for services, after examination and written approval by the magistrate, shall be forwarded to the department of public utilities within thirty days after the date of the inquest, and, when made, a copy of the magistrate's report on the inquest. The bill, when approved by said department, shall be forwarded to the comptroller and paid by the commonwealth, assessed on the person owning or operating such railroad or railway, or motor vehicle, and shall be collected in the same manner as taxes upon corporations. The magistrate may in his discretion refuse fees to witnesses in the employ of the person upon whose railroad or railway, or the person licensed under said chapter one hundred and fifty-nine A for the operation of the motor vehicle in connection with the operation of which, the accident occurred.

38:12. Report of findings at inquest.

Section 12. The magistrate shall report in writing when, where and by what means the person met his death, his name, if known, and all material circumstances attending his death, and the name, if known, of any person whose unlawful act or negligence appears to have contributed thereto. He shall file his report in the superior court for the county where the inquest is held.

38:13. Persons charged with crimes; authority to arrest; binding over of witnesses.

Section 13. If a person charged by the report with the commission of a crime is at large, the magistrate shall forthwith issue process for his arrest, returnable before any court or magistrate having jurisdiction. If he finds that murder, manslaughter or an assault has been committed, he may bind over, for appearance in said court, as in criminal cases, such witnesses as he considers necessary, or as the district attorney may designate.

APPENDIX B

Kennedy v. Justice of the District Court of Dukes County, 356 Mass. 367, 252 N.E.2d 201 (1969)

EDWARD M. KENNEDY *vs.* JUSTICE OF THE DISTRICT COURT OF DUKES COUNTY (and two companion cases[1]).

Suffolk. October 8, 1969. — October 30, 1969.

Present: WILKINS, C.J., SPALDING, CUTTER, SPIEGEL, & REARDON, JJ.

Inquest. Supreme Judicial Court, Supervision of inferior courts. *Certiorari. Judge.*

Statement of the statutory background of inquests held under G. L. c. 38, §§ 8–13. [371–372]

Certiorari did not lie to review rulings by a District Court judge relating to procedure to be followed at an inquest to be conducted by him under G. L. c. 38, §§ 8–13. [373]

Public interest in and extensive publicity respecting the death of a woman while a passenger in an automobile operated by a prominent political person when it went off a bridge on an island, and the operator's activities thereafter, and unusual problems presented by an inquest into the woman's death to be conducted pursuant to G. L. c. 38, §§ 8–13, by a District Court judge who had made rulings respecting procedure to be followed at the inquest, made it appropriate for this court to exercise its extensive administrative powers, including those under c. 211, § 3, as amended through St. 1956, c. 707, § 1, to review the rulings in order to avoid risk of serious abuse of the inquest procedure or of a miscarriage of justice. [373, 375–376]

Discussion of the character and conduct of an inquest held under G. L. c. 38, §§ 8–13. [373–375]

Inquest proceedings under G. L. c. 38, §§ 8–13, are not accusatory and should be regarded as investigatory. [376]

Statement of the principles and the procedure to be applied in all inquests held under G. L. c. 38, §§ 8–13. [377–378]

Nothing in the record of proceedings against a District Court judge to review his rulings as to the procedure to be followed at an inquest to be conducted by him indicated that he should be disqualified from conducting the inquest because he was a party to the review proceedings or to avoid bias or the appearance of bias. [379]

THREE PETITIONS filed in the Supreme Judicial Court for the county of Suffolk on September 2, 1969.

[1] The companion cases are petitions by Joseph Gargan and by John B. Crimmins and seven other petitioners against the same respondent.

The cases were reported by *Reardon*, J.

Edward B. Hanify (*Robert G. Clark, Jr., John M. Harrington, Jr., Thomas G. Dignan, Jr., Robert F. Hayes & John S. Hopkins, III*, with him) for Edward M. Kennedy.

Paul J. Redmond (*Daniel J. Daley* with him) for John B. Crimmins & others.

Joseph P. Donahue, Jr. (*George W. Anthes* with him) for Joseph Gargan.

Joseph J. Hurley, Assistant Attorney General (*Robert H. Quinn*, Attorney General, and *Walter H. Mayo, III, James P. Kiernan, Ruth I. Abrams & William E. Searson, III*, Assistant Attorneys General, with him) for the Justice of the District Court of Dukes County.

Henry P. Monaghan, for Civil Liberties Union of Massachusetts, amicus curiae, submitted a brief.

BY THE COURT. These cases, originally brought in the county court for Suffolk County, are each entitled, "Petition for Writ of Certiorari and Related Relief Pursuant to G. L. c. 211, § 3." They seek review of certain acts of the respondent relating to an inquest at which he was to preside. The cases involve questions not covered by our decisions. To expedite their consideration, the single justice properly reserved and reported the cases "for such decree as may be appropriate." The record consists of the consolidated petitions, the respondent's return, the transcript of proceedings in the county court, the single justice's order of September 2, 1969, which enjoined the respondent from proceeding with the inquest pending a determination by the full court, and the statement of agreed facts.

We summarize the agreed facts. On or about July 18, 1969, Miss Mary Jo Kopechne of the District of Columbia, formerly a secretary in Washington to the brother of the petitioner Kennedy, died after the automobile in which she was riding and which was operated by the petitioner Kennedy went off "Dyke Bridge" on Chappaquiddick Island in the County of Dukes County. Each of the petitioners and the deceased were in attendance at a social event which took place on Chappaquiddick Island on the evening of July 18.

On July 25 the petitioner Kennedy before the respondent, the justice of the District Court of Dukes County, pleaded guilty to, and was sentenced, upon a complaint under G. L. c. 90, § 24 (2) (a), commonly known as leaving the scene of an accident after causing personal injury.

Later that day the petitioner Kennedy requested and received from the three major Boston television stations and their associated radio stations, the opportunity to address the voters of the Commonwealth. The national television and radio networks requested and received from this petitioner and from those Boston television and radio stations, permission to tie in and broadcast his statement, which was later broadcast nationally by television and radio. The statement, which is set forth verbatim in the agreed facts, contains some explanation of his conduct. He in part stated: "These events and the publicity and innuendo and whispers which have surrounded them, and my admission of guilt this morning, raises the question in my mind of whether my standing among the people of my State has been so impaired that I should resign my seat in the United States Senate." He concluded by appealing to the people of Massachusetts for their advice and opinion to enable him to make a decision on that question.

On August 7 the district attorney of the Southern District by letter to the respondent exercised his authority under G. L. c. 38, § 8 (as amended through St. 1939, c. 30),[2] to require an inquest in the death of Miss Kopechne. On August 8 the respondent designated September 3 as the date for the inquest and announced in open court: "The statutes permit exclusion of all those not required to attend. I have decided to exercise some discretion in that regard and to exclude all except legitimate and accredited members of the press, television, radio and other news media." Subpoenas were served upon fifteen witnesses, and other subpoenas were issued by the clerk, but not served, on the petitioners in one of the two companion cases. Thereafter

[2] See footnote 3.

the clerk of the District Court drew up and posted a long list of representatives of news media who would be permitted to attend the inquest. The court room, the only one on the island of Martha's Vineyard, has 160 seats, 120 of which are outside the bar enclosure. Because the petitioner Kennedy is a prominent political figure, all events relating to the accident, including the scheduled inquest, have been given extensive coverage by the local, national, and international news media.

The petitioner Kennedy, describing himself as "the operator of the motor vehicle," and all the other petitioners, describing themselves as "prospective witnesses," filed motions in substance that they "be permitted the right to be represented by counsel . . . and to have counsel present during the entire proceeding, that . . . counsel be permitted to examine and cross-examine all witnesses and to seek rulings from the court with respect to the relevancy . . . of all evidence, to present evidence and to have the power to compel attendance of witnesses . . . ." There were hearings before the respondent on August 27 and 28. These motions were denied on August 28, the judge stating: "I am not satisfied that the United States Supreme Court would read the Due Process Clause into our inquest procedure. That is for the United States Supreme Court to say and not for me. . . . Witnesses will come into the courtroom singly, may be represented during their appearance in the courtroom by counsel for the sole purpose of advice on constitutional rights against self-incrimination and, where appropriate, [on] privileged communications, and for no other purpose and counsel for that witness will leave the courtroom when the witness leaves the courtroom."

During the hearings the respondent twice declared that it was essential that the petitioner Kennedy, the only eyewitness, be present at the inquest.

At the August 27 hearing, in response to a question by counsel for some petitioners as to "what the ground rules are going to be," the judge had said "That the scope of the proceedings will be such as will enable me to submit the report

required" by G. L. c. 38, § 12. "That is, that I must report in writing when, where and by what means the person met her death, her name, if known, and all material circumstances attending her death and the name, if known, of any person whose unlawful act or negligence appears to have contributed thereto. I will go no farther than saying that will be the scope of the inquest. As to physical aspects, I can tell you that there will be no microphones, no cameras, no listening or recording devices allowed in the courtroom. . . . The District Attorney has an option to examine and call witnesses, but as I see it, the primary responsibility rests with the judge who may, and in my case would, call any other witnesses, as the evidence develops, he thinks might have something to add to the truth." On the following day at the hearing the judge repeated that he would call "everybody who can be helpful in reaching the required decision."

The petitions for writs of certiorari allege that the rulings of the respondent deprive the petitioners of rights secured to them by the Sixth Amendment to the Constitution of the United States as applied to the States by the Fourteenth Amendment in that (1) the order of August 28 operates to deprive them of the rights to be represented by counsel, to confront and cross-examine witnesses, to present evidence and to compel the attendance of witnesses, in "a public and formal judicial proceeding which constitutes the exercise of an accusatory function"; and (2) the ruling of August 8 "sanctions publicity in connection with a hearing of a preliminary nature so widespread as to taint with irremediable prejudice any subsequent judicial proceedings which may arise out of the accident." The petitions allege that the rulings have caused substantial injury and manifest injustice to the petitioners.

In this Commonwealth over a century ago inquests in violent deaths were conducted by coroners with a jury of six. Rev. Sts. (1836) c. 140, §§ 1, 2. The coroner had power to summon and swear witnesses (§§ 5, 6), whose testimony was reduced to writing by the coroner (§ 7). The jury

delivered to the coroner their inquisition in which they were to find when, how, and by what means the deceased person came to his death and all the material circumstances. If it appeared that he was murdered, the jurors were to state who was guilty (§ 8). The coroner had power to bind over witnesses to the appropriate court (§ 9). If any person charged by the inquest with having committed the offence was not in custody, the coroner had power to issue process for his apprehension (§ 10).

By St. 1850, c. 133, § 1, it was provided that the coroner with the consent of a majority of the jury "may order that a secret inquisition be taken." In such case he might at his discretion exclude all persons other than those required to be present, and during the examination of a witness might exclude all the other witnesses, and direct that they be kept separate. By St. 1877, c. 200, the office of coroner was abolished (§ 1), and that of medical examiner was created (§ 2). The inquest was to be conducted by the court or a trial justice (§ 10), who was to make the report (§ 12). He had power in certain cases to bind over witnesses "as in criminal prosecutions" to appear and testify at the court in which an indictment might be found (§ 13), and to issue process for arrest of persons not in custody (§ 14).

The subject of inquests is now covered by G. L. c. 38, §§ 8–13.[3]

[3] ". . . The . . . district attorney may . . . require an inquest to be held in case of any death supposed to have been caused by external means. The court or justice shall give seasonable notice of the time and place of the inquest . . . to the department of public works in any case of death in which any motor vehicle is involved. All persons not required by law to attend may be excluded from the inquest. The district attorney . . . may attend the inquest and examine the witnesses, who may be kept separate so that they cannot converse with each other until they have been examined" (§ 8). "The magistrate shall report in writing when, where and by what means the person met his death, . . . and the name, if known, of any person whose unlawful act or negligence appears to have contributed thereto. He shall file his report in the superior court for the county where the inquest is held" (§ 12). "If a person charged by the report with the commission of a crime is at large, the magistrate shall forthwith issue process for his arrest, returnable before any court or magistrate having jurisdiction. If he finds that murder, manslaughter or an assault has been committed, he may bind over, for appearance in said court, as in criminal cases, such witnesses as he considers necessary, or as the district attorney may designate" (§ 13).

At the threshold lies a serious question of procedure. It is our opinion that certiorari will not lie. We have been referred to *Drowne* v. *Stimpson*, 2 Mass. 441, 445, where proceedings on a bastardy complaint were quashed on writ of error. The last sentence of that opinion drew a distinction from certiorari which, it was there said, would lie at "any stage of the proceedings, at the *discretion* of the court." This statement was not necessary to that decision, and has not been adopted in our practice as a method of reviewing rulings by a quasi-judicial tribunal before any final determination by that tribunal.[4] We need not now intimate whether there may be a review of an inquest like the present after completion of the proceeding.

We are asked by the petitioners to exercise our extensive powers including those under G. L. c. 211, § 3 (as amended through St. 1956, c. 707, § 1). This statute recognizes that this court has "general superintendence of the administration of all courts of inferior jurisdiction" including the issuance of "such orders, directions and rules as may be necessary or desirable for the furtherance of justice, the regular execution of the laws, the improvement of the administration of such courts, and the securing of their proper and efficient administration." We have seldom exercised these powers except as one basis for a rule of general application. Nevertheless, we consider whether there is such risk of serious abuse of the inquest procedure, or of a miscarriage of justice, as to make it appropriate for us to act.

The practice in inquests in the Commonwealth has been to allow the course of the proceedings to remain in the discretion of the District Court. An inquest is not a prosecution of anybody. It is not a trial of anyone. The pertinent statutory provisions exemplify a public policy that the inquest serves as an aid in the achievement of justice by obtaining information as to whether a crime has been committed. See Second and Final Report of Judicature Com-

[4] Holding an inquest is a quasi-judicial function. *LaChapelle* v. *United Shoe Mach. Corp.* 318 Mass. 166, 169, and cases cited.

mission, 6 Mass. L. Q. No. 2, p. 109. Probably most inquests have been closed to the public. Some inquests have been public, usually where the matter was not of general interest.

It never has been expressly provided in legislation in this Commonwealth that inquests must be secret. We cannot attribute that result to the ambiguous statement in *Jewett* v. *Boston Elev. Ry.* 219 Mass. 528, 532, where the authorities cited are statutes which are the ancestors of sections now in G. L. c. 38, relating to medical examiners and inquests, and show that no such interpretation was intended. When the Legislature has intended to have closed proceedings, as in the case of the grand jury, the statutory language has been unmistakable. See G. L. c. 277, §§ 12, 13.

Few decisions in the Commonwealth discuss the conduct of inquests. Such decisions as there are seem to be consistent with what appears to be the law generally. This is, in effect, that inquests are investigatory in character and not accusatory. *State ex rel. Schulter* v. *Roraff*, 39 Wis. 2d 342, 350–351. *Wolfe* v. *Robinson* (1961) Ont. 250, 262, 27 D. L. R. 2d 98; affd. (1962) Ont. 132, 31 D. L. R. 2d 233. They are not part of any criminal proceedings which may ensue. *People* v. *Coker*, 104 Cal. App. 2d 224, 225. *State* v. *Burnett*, 357 Mo. 106, 112. Cf. *LaChapelle* v. *United Shoe Mach. Corp.* 318 Mass. 166, 169–170. Under statutes resembling our own, in order to initiate a criminal prosecution, there must be subsequent and independent criminal proceedings. *Smalls* v. *State*, 101 Ga. 570, 571. *Commonwealth ex rel. Czako* v. *Maroney*, 412 Pa. 448, 450. It may be that, to show an admission or confession at an inquest or to prove the prior inconsistent statement of a witness, some evidence at an inquest will be admissible at later criminal proceedings in accordance with usual principles of the law of evidence. The inquest decision itself is not admissible. See *Jewett* v. *Boston Elev. Ry.* 219 Mass. 528, 531–533; *Aetna Life Ins. Co.* v. *Milward*, 118 Ky. 716, 725–731. See also *Commonwealth* v. *Ryan*, 134 Mass. 223. There is no inherent right of any witness at an inquest to cross-examine

other witnesses or to present evidence of his own. *Aetna Life Ins. Co.* v. *Milward*, 118 Ky. 716, 726. *State* v. *Griffin*, 98 S. C. 105, 111. *People* v. *Collins*, 20 How. Pract. Rep. 111, 114 (N. Y. Oyer and Terminer). The magistrate holding the inquest has wide discretion on its conduct. Anderson, Sheriffs, Coroners & Constables, § 747. He may permit cross-examination or the presentation of evidence by possibly interested persons when it may be helpful to the magistrate or might serve to diminish the possibility of injustice or to avoid injury to reputation. There is, of course, some practical limit to the number of counsel who helpfully can participate in the same hearing at the same time. He may, we assume, receive and record sworn offers of proof as an aid to determining whether the receipt of testimony will help him in any respect or as a method of affording witnesses the opportunity for amplification or correction of their own testimony or that of others. He should carefully explain to witnesses, if it appears to be necessary or appropriate to do so, their privilege not to incriminate themselves. See *State* v. *Burnett*, 357 Mo. 106, 112–114. See also *People* v. *Ferola*, 215 N. Y. 285. Cf. *Neely* v. *United States*, 144 F. 2d 519 (Ct. App. D. C.), cert. den. 323 U. S. 754. The inquest judge also may close the hearings in whole or in part and at any time in order to avoid unfairness to anyone or to prevent improper prejudice in possible subsequent criminal proceedings. G. L. c. 38, § 8. In so doing he may take into account previous public statements and the relative advantages and risks of public, compared with closed, hearings, including the risk of erroneous rumors.

The inquest here presents unusual problems. It has aroused great public interest, which in turn has stimulated very great efforts by the press, radio, television, and other media to provide news coverage. The petitioners suggest that intensive coverage of the inquest might involve unfortunate pre-trial publicity if the proceedings and the report should lead to action before a grand jury or to a prosecution for some offence. The circumstance that the petitioner

Kennedy was the operator of the vehicle and the only available eyewitness has caused him to become what his counsel describes as the focus of the investigation. This has led to the argument that the proceedings have become accusatory as to him and to a demand that he at once be accorded what would be constitutional rights of a defendant in a criminal case. The other petitioners make somewhat similar claims for themselves.

We think that inquest proceedings are not accusatory and that they should be regarded as investigatory. The decisions already cited are controlling in this respect. Nevertheless, if the proceedings are public, the activities of the news media may be such as to make it difficult, if not impossible, for a long time to ensure to a defendant a fair trial in any criminal proceedings which may follow the inquest. A public inquest also may tend to limit or delay the inquest investigation.

The difficulties presented are not lessened by the circumstance that the petitioner Kennedy's own resort to television may itself have increased public interest in the events of July 18, 1969, and public demand for a more complete investigation and explanation of those events. The risk of prejudice in possible later proceedings from pre-trial publicity remains.

We shall not make any special rule for a particular case. If it is desirable to prescribe procedural rules for any Massachusetts inquest, those rules must affect all inquests and all participating persons equally. Although few inquests may be likely to arouse public interest as has this one, other situations involving similar risks of prejudice may occur and citizens and others, less well known to the public and less able to protect themselves, affected by, or participating in less conspicuous inquests, must have whatever type of protection, if any, is now to be afforded to these petitioners.

Recent cases in the Supreme Court of the United States discussing the dangers of pre-trial publicity go far in the direction of protecting actual defendants. See e.g. *Estes* v. *Texas*, 381 U. S. 532; *Sheppard* v. *Maxwell*, 384 U. S. 333.

See also *Delaney* v. *United States*, 199 F. 2d 107, 115 (1st Cir.). See *State ex rel. Schulter* v. *Roraff*, 39 Wis. 2d 342. They point to the wisdom of taking action to diminish such dangers.

The petitioners also lay great store by *Jenkins* v. *McKeithen*, 395 U. S. 411, a 5 to 3 decision of the Supreme Court of the United States dated June 9, 1969, in a controversy between a labor union member and the Labor-Management Commission of Inquiry created by an unusual Louisiana statute. The opinion of three justices appears to rest in large measure upon the ground (pp. 424–425) that the complaint contained sufficient allegations of injury to the complainant to afford him "standing to challenge" the statute and (pp. 429–431) to make a hearing in the trial court appropriate to determine whether the complainant was "entitled to declaratory or injunctive relief." Two justices concurred. There was a persuasive dissent in which three justices joined. One justice of the three joining in the first opinion has retired. We are by no means clear what the precise ratio decidendi is, or that the decision (see e.g. p. 430) has any necessary application to our investigatory inquest procedure, which has a long historical background. We hope that the *Jenkins* case will be materially clarified before we are again confronted by it.

The cases just cited, although in our opinion not decisive, do suggest general reappraisal of our inquest procedure in the interest of making it conform more closely with certain constitutional views expressed in the decisions, mentioned above, of the Supreme Court of the United States. We think that, to protect the integrity, the investigatory character, and the effectiveness of inquests, it is desirable to prescribe application of the following general principles: (1) All inquests shall be closed to the public and to all news media. (2) Witnesses may be accompanied and advised by counsel while in attendance or testifying at an inquest. (3) In other respects, inquests shall be conducted in the sound discretion of the inquest judge in general in accordance with the principles already discussed above. (4) Upon the completion of the inquest, the inquest documents shall

remain impounded and the inquest judge shall transmit his report and a transcript of the evidence received by him to the appropriate clerk of the Superior Court. (5) While these papers remain impounded, access to the report and transcript shall be afforded only to the Attorney General, the appropriate District Attorney, and to counsel for any person who has been stated in the report as having actual or possible responsibility for the decedent's death, except that any witness at the inquest shall be permitted, through counsel or directly, to check the accuracy of the transcript of his own testimony and to file with the inquest judge and the appropriate clerk of the Superior Court any suggested corrections. (6) (a) If the District Attorney shall file with the appropriate clerk of the Superior Court a written certificate that no prosecution is proposed, or (b) if it shall appear that an indictment has been sought and not returned, or (c) if trial of the persons named in the report as responsible for the decedent's death shall have been completed, or (d) if a judge of the Superior Court shall determine that no criminal trial is likely, then upon order of the Superior Court, the report and transcript shall be opened forthwith to public examination.

The principles outlined above should not hinder or delay the pending inquest or any other proper inquest inquiry. Indeed, such inquiries may be substantially facilitated by encouraging witnesses to come forward and to make full disclosure without fear that their testimony will be published in segments or out of context, or published at all (a) until passed upon by the inquest judge in his report and until the events have been considered by the fact finder in any criminal proceeding, and (b) until after probability of criminal proceedings has ceased. These general rules tend to avoid embarrassment, by premature publicity about an investigation conducted in behalf of the Commonwealth, either to the Commonwealth (in seeking or prosecuting indictments or complaints) or to any potential defendant in making a defence. Under the principles stated, all facts concerning the inquiry must eventually be published, and

at the earliest possible time consistent with fairness to all parties. Their application, as has been suggested above, will make the Massachusetts inquest procedure less vulnerable to future constitutional objection if some views expressed in the *Jenkins* case, 395 U. S. 411, *supra*, should be expanded.

The District Court judge should not be disqualified on the record before us. The first reason given is that the judge is a party to the present litigation. He was, of course, made a formal party by the petitioners as a method of seeking review of the orders. This is not enough to disqualify him. *Kelly* v. *New York, N. H. & H. R.R.* 139 F. Supp. 319, 320 (D. Mass.). The petitioners also argue that disqualification will avoid bias or the appearance of bias. An earlier expression of opinion on a matter to be decided is not the kind of bias which disqualifies a judge. *King* v. *Grace*, 293 Mass. 244, 247, and cases cited. The alleged bias and prejudice to be disqualifying must rise from an extrajudicial source and not from something learned from participation in the case. *United States* v. *Grinnell Corp.* 384 U. S. 563, 583.

The petitions for writs of certiorari are to be dismissed. The proposed inquest, and all inquests hereafter, shall proceed in compliance with the general principles herein specified.

So ordered.

APPENDIX C

Sample Autopsy Report

COMMONWEALTH OF MASSACHUSETTS
OFFICE OF THE CHIEF MEDICAL EXAMINER
UNIVERSITY OF MASSACHUSETTS MEDICAL CENTER
55 LAKE AVENUE NORTH
WORCESTER, MASSACHUSETTS 01605

AUTOPSY REPORT

Case No. CME

Name _____ Age _____ Race _____ Sex _____

Address _____

Date and Time of Death February 1, 1984 at 3:33 a.m.

Date and Time of Autopsy February 1, 1984 between 3:30 p.m. & 6:30 p.m.

Medical Examiner Brian D. Blackbourne, M.D.

County and District Suffolk

CAUSE OF DEATH: Multiple gunshot wounds

MANNER OF DEATH:

- ☐ Natural Causes
- ☐ Accident
- ☐ Suicide
- ☒ Homicide
- ☐ Undetermined

Signature Brian D. Blackbourne, M.D.

Pathologist Brian D. Blackbourne, M.D.

Address 784 Massachusetts Avenue, Boston

CME 004 Rev 7/83

CLOTHING:

The body is received nude from the hospital after thoracic surgery has been performed.

EXTERNAL DESCRIPTION:

This is the body of a 60 year old Black male 5 feet 5 1/2 inches in height and weighing an estimated 165 pounds. Scalp hair is black and gray and short. The irides are brown. Pupils are equal, round and in mid-dilatation. The conjunctivae are clear. Both upper and lower jaws are edentulous. The lips reveal no laceration or other injury. A gray mustache and an estimated 2 days growth of face beard are present. The neck is symmetrical with 4 hospital needle puncture marks on the right anterolateral neck.

CHEST: A left thoracotomy incision 12 inches in length extends across the anterior and lateral left chest. A 2 inch thoracotomy incision is present on the right anterolateral chest. A re-entry gunshot wound is present on the posterolateral aspect of the left chest below the armpit.

ABDOMEN: The abdomen is flat without injury or surgical scar. A 2 1/2 inch long surgical cutdown incision is present in the left groin.

ARMS: A perforating gunshot wound is present on the left upper arm with entrance on the lateral aspect and exit on the posterior aspect. In addition, a penetrating gunshot wound also is present on the left arm with the entrance on the lateral aspect of the mid upper arm. In addition, a single hospital needle puncture mark is present on the right antecubital fossa. A marked deformity of the tip of the left index finger is noted with an abrasion 3/16 inch by 1/2 inch on the thenar aspect of the distal phalanx of the left index finger. X-ray examination of the hand exhibits 2 tiny stipules of foreign material but no other foreign body.

LEGS: No injuries are noted on the legs. The ankles show no swelling.

BACK: No injuries are noted on the back.

INTERNAL DESCRIPTION:

The subcutaneous midline abdominal fat is 4 cm. thick. The 9th left rib reveals a gunshot fracture at a point 13 1/2 inches below the top of the left shoulder. The spine and pelvis reveal no fractures. Scattered fibrous pleural adhesions are present. The peritoneal cavity contains 600 ml. of hemorrhage as well as an estimated 400 ml. of retroperitoneal hemorrhage on the left side of the back of the abdomen. The right pleural cavity contains normal fluid. The left pleural cavity and the pericardial cavity have been surgically opened through the left thoracotomy.

HEART: Weight: 720 grams. The coronary arteries arise normally and serial sections show only mild arteriosclerosis. The heart is markedly enlarged. A grazing gunshot wound perforates the epicardium and the superficial subepicardial myocardium on the left side of the apex of the left ventricle. This gunshot wound does not penetrate into the lumen of the heart. No major coronary artery branch is interrupted. The valve leaflets are thin but slightly dilated. No primary valvular disease is noted. The myocardium on sectioned surface shows marked left ventricular hypertrophy without fibrosis or infarction. The aorta reveals moderately severe arteriosclerosis most particularly in the distal abdominal portion where ulceration is noted. There are no injuries to the great vessels.

LUNGS: Weight: Right, 760 grams, left, 560 grams. The pleural surfaces are smooth. The pulmonary artery is markedly dilated and arteriosclerotic plaques are noted in the lining of the pulmonary arteries. The bronchi contain extensive watery mucus. Sectioned surfaces of both lungs are poorly aerated with no pneumonia or hemorrhage. No injury is present to the lungs.

LIVER: Weight: 2140 grams. The capsule is smooth. The margins are rounded. The liver is increased in size. Sectioned surfaces are tan brown and slightly friable. The gallbladder contains 20 ml. of dark green bile. One lymph node in the porta hepatis measures 1 cm. in diameter.

SPLEEN: Weight: 120 grams. A gunshot wound has produced a large and destructive laceration involving 3/4 of the surface of the spleen. This large area of destruction is the source of the hemorrhage within the abdomen. The spleen is soft, dark purple without any pre-existing abnormality.

KIDNEYS: Weight: Left, 260 grams, right, 240 grams. The cortical surfaces are smooth. The renal artery is patent. The left ureter is slightly dilated. Sectioned surfaces of both kidneys show normal architecture with only congestion. The urinary bladder is slightly trabeculated and the prostate on section surface reveals moderate benign prostatic hypertrophy.

ADRENAL GLANDS: Both adrenal glands exhibit diffuse bilateral cortical hyperplaisia.

STOMACH: Contents: 60 ml. of recently ingested food material. The gastric mucosa is congested. The esophageal mucosa is smooth pink. The pancreas weighs 160 grams and is normally lobulated. The large and small bowel are unremarkable. The appendix is present and unremarkable.

NECK: The skin of the anterior neck exhibits hospital needle puncture marks on the right anterolateral aspect. Beneath the skin hemorrhage is present in the subcutaneous tissue. The laryngeal lumen is patent. The mucosa of the larynx is congested. The bony structures of the larynx reveal no fracture. The thyroid gland has a normal configuration and is medium brown. The cervical spine reveals no fracture

Both the oral pharynx and the nasopharynx are patent.

SCALP: The cutaneous surface of the scalp shows no injury. There is no hemorrhage beneath the scalp. The skull contains no fracture. There is no intracranial hemorrhage.

BRAIN: Weight: 1280 grams. The leptomeninges are smooth and glistening. The vessels at the base of the brain are of normal anatomic configuration with moderate arteriosclerosis narrowing up to 40% of the lumen. Multiple coronal sections of the cerebral hemispheres reveal no hemorrhage, infarction or remote ischemic lesion.

GUNSHOT WOUNDS

GUNSHOT WOUND A:

ENTRANCE WOUND: Entrance wound A is located on the lateral aspect of the left upper arm and of the 2 wounds there located, wound A is the upper. The wound is 3/8 inch by 5/8 inch in diameter and has an eccentric margin of abrasion, the larger margin being inferior. The center of entrance wound A is located 17 inches below the top of the head and 8 1/2 inches below the top of the shoulder.

POINT OF RECOVERY OF BULLET: The bullet is recovered in the muscles of the back of the shoulder at a point 2 inches below the top of the left shoulder and 6 inches to the left of the midline.

PATH OF GUNSHOT WOUND: The gunshot wound extends from the wound of entrance on the lateral aspect of the left upper arm and is directed upwards along the long axis of the upper arm through the muscles but does not fracture the bone of the upper arm. It extends into the muscles of the back of the shoulder where a metal jacketed bullet with an exposed lead nose, consistent with a .38 caliber is recovered. This projectile is transferred to the custody of Detective Carr of the Boston City Police Department at 10:00 a.m. on February 2, 1984.

The path of the gunshot wound is upward, slightly medially and very slightly posteriorly with the arm in the anatomical position beside the chest.

GUNSHOT WOUND B:

ENTRANCE WOUND: Entrance wound B is located on the lateral aspect of the left upper arm. Of the 2 wounds on the left upper arm B is the lower one, closest to the elbow. The wound measures 3/8 inch by 5/8 inch and has an eccentric margin of abrasion. The larger diameter of the abrasion collar is located anteriorly. The entrance wound is located 17 3/4 inches below the top of the head and 9 1/4 inches below the top of the shoulder on the lateral aspect of the arm.

EXIT WOUND: The exit wound is located on the back of the midportion of the left upper arm. The exit wound is slightly star shaped and measures 3/8 inch by 1/4 inch. The center of the exit wound is 9 inches below the top of the left shoulder and 6 inches above the elbow.

RE-ENTRANCE WOUND: The wound of re-entry is located on the posterolateral aspect of the left side of the chest below the armpit. The wound is irregular and measures 3/8 inch by 5/8 inch. The center of this re-entrance wound is located 19 inches below the top of the head, 10 1/2 inches below the shoulder and 6 3/4 inches to the left of the midline.

PATH OF THE GUNSHOT WOUND: The path of gunshot wound B extends from the entrance wound on the lateral aspect of the left upper arm, perforates the left upper arm, exiting from the posterior surface. In the process metal fragments of the bullet are deposited in the soft tissues and are recovered. The bullet then re-enters the posterolateral chest wall, fractures the left 9th rib, grazes the lateral aspect of the apex of the heart, perforates the left leaf of the diaphragm, lacerates the spleen causing extensive hemorrhage and a deformed large lead bullet is recovered in the soft tissues in the left side of the upper abdomen at a point 15 1/2 inches below the top of the left shoulder and 2 1/2 inches to the left of the midline.

The path of the gunshot wound extends from the lateral to the posterior aspect of the left upper arm and then perforates through the chest and abdomen in a left to right and slightly downward direction. The bullet is transferred to the custody of Detective Carr of the Boston City Police Department at 10:00 a.m. on February 2, 1984.

DIAGNOSES:

I. Multiple gunshot wounds.

   A. Gunshot wound of left arm and shoulder.

   B. Gunshot wound of left arm, chest and abdomen.

      1. Grazing gunshot wound of left ventricle of heart and gunshot wound of spleen with hemoperitoneum.

II. Fatty metamorphosis of liver.

III. Left ventricular hypertrophy of heart (720 gram heart).

CAUSE OF DEATH:

Multiple gunshot wounds

MANNER OF DEATH:

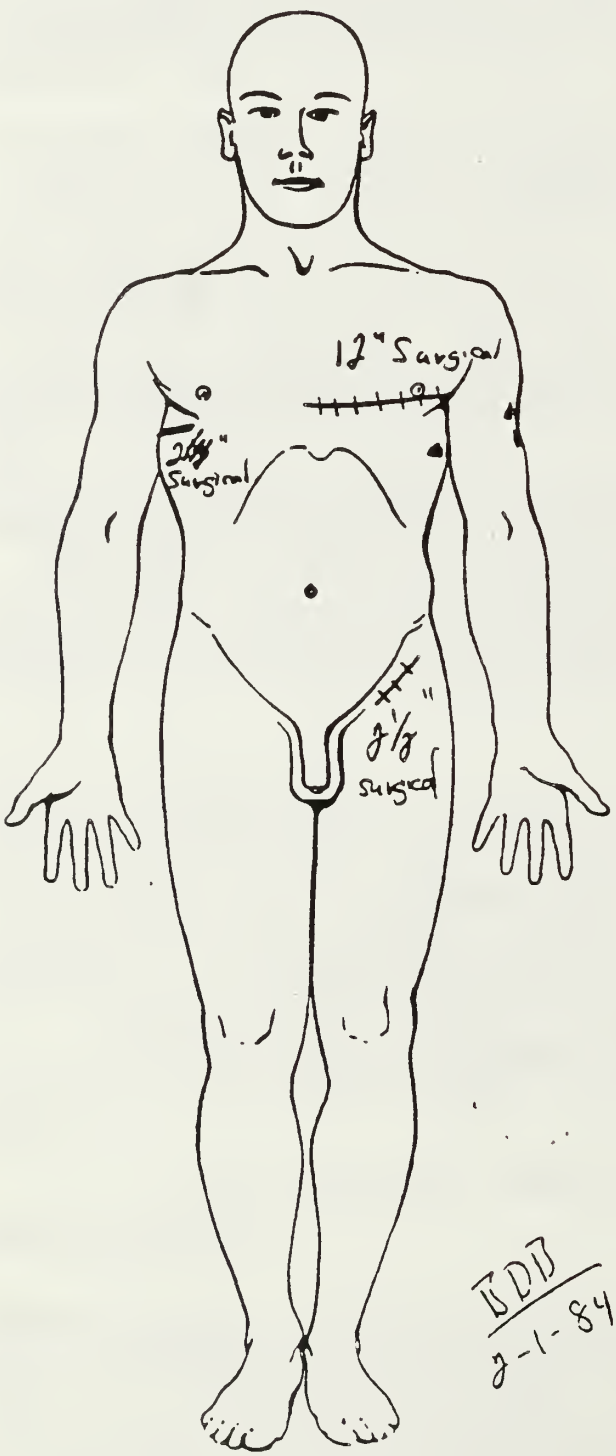
Homicide

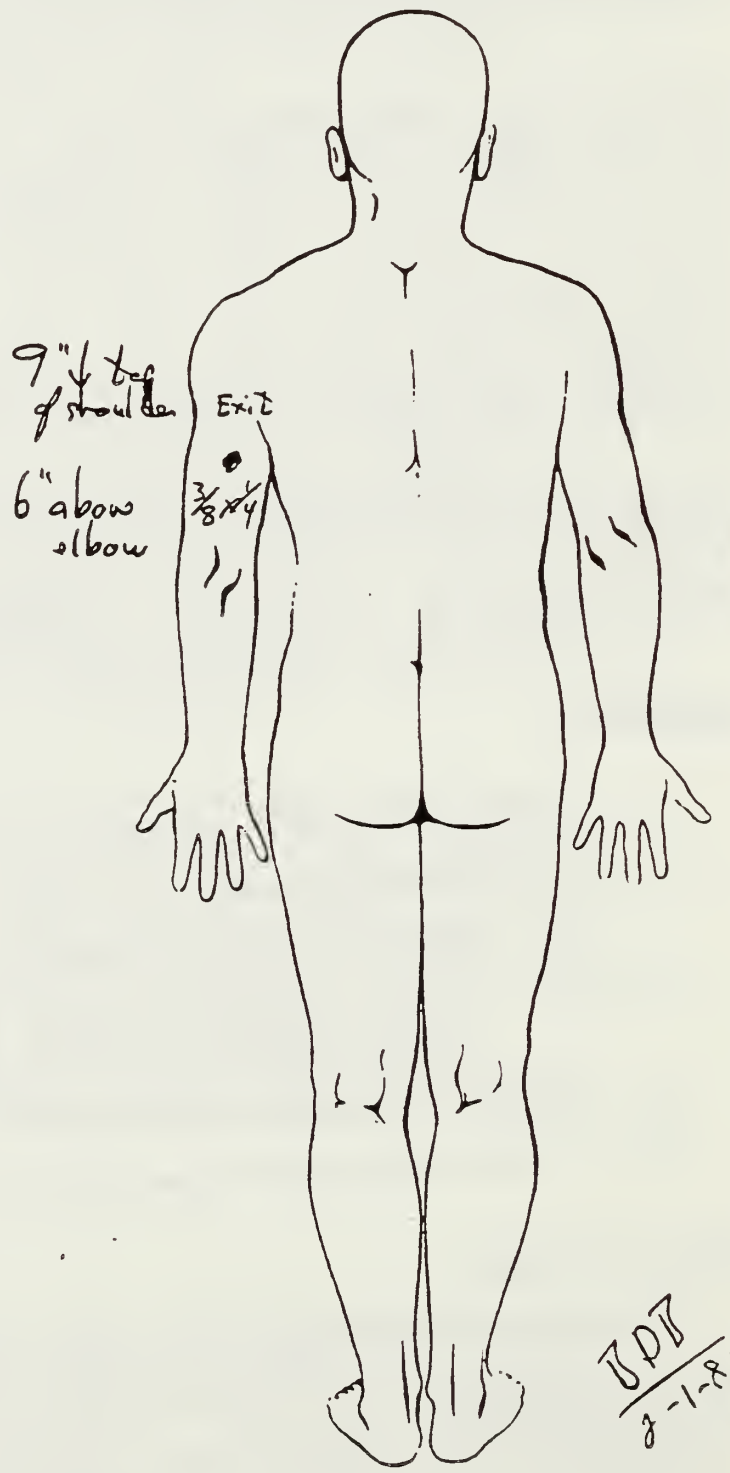
OFFICE OF CHIEF MEDICAL EXAMINER

UNIVERSITY OF MASSACHUSETTS MEDICAL CENTER
55 LAKE AVENUE NORTH
WORCESTER, MASSACHUSETTS 01605

NAME _____ _____ _____ STATE CASE NO. _____

AGE 60 RACE B SEX M DATE 2-1-84



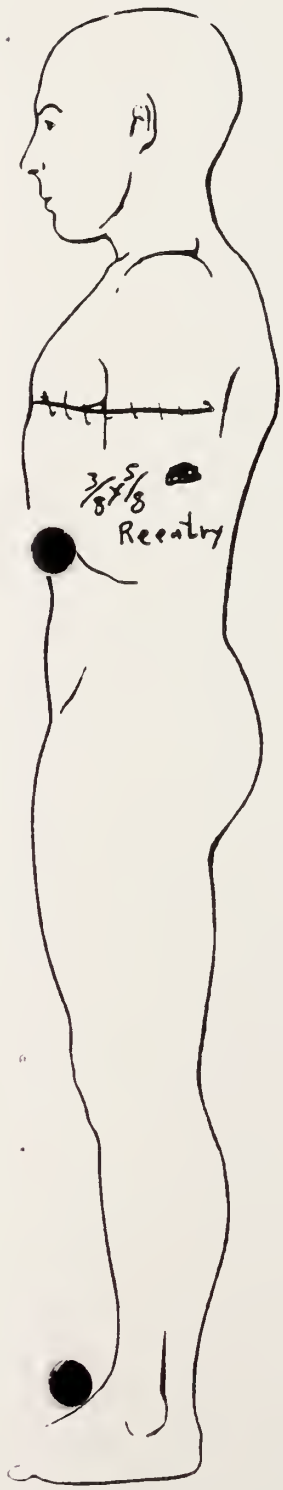


CME 006 Rev 7/83

COMMONWEALTH
OFFICE OF THE CHIEF
UNIVERSITY OF MASSACHUSETTS
55 LAKE AVENUE NORTH
WORCESTER, MASSACHUSETTS 01605

NAME _____ STATE CASE NO. _____

AGE 60 RACE B SEX M DATE 2-1-84



19" ↓ top of head
10½" ↓ shoulder
6¾" (L) of mid

L. Arm

17" ↓ head
8½ ↓ shoulder

17¾" ↓ head
9¼ ↓ shoulder
Lateral aspect

BDB
2-1-84

BDB
2-1-84

LEFT HAND

APPENDIX D

Sample Inquest Report

COMMONWEALTH OF MASSACHUSETTS

Suffolk, ss.

Boston Municipal Court
Department

Inquest No. 1-1983

Inquest in the Matter of Eligha Pate, Jr.

REPORT

The present inquest into the circumstances of the death of one Eligha Pate, Jr., on September 7, 1983, conducted pursuant to General Laws Chapter 38, Sections 7 through 9, was commenced at the request of the District Attorney for Suffolk County, after consultation by him with the County's Medical Examiner. In accordance with the statutory mandate, the Court conducted a hearing to determine the circumstances attending the death of the said Pate and the identity of any person whose unlawful act or negligence contributed to Pate's death. See Gen. Laws c. 38, sec. 12.

I. PROCEDURE

The hearing in this matter began on September 26, 1983, and was concluded on October 17, 1983. There were fourteen days of testimony taken from a total of fifty-one witnesses. Sixty-six items were marked as exhibits in evidence. The Court viewed the scene of the incident which concluded in Pate's death, as well as the automobile he had been operating that night. The transcript of the hearing exceeds 2700 pages in length. In accordance with

applicable law, the hearing was closed to the public. The transcript and the exhibits are impounded by order of the Court.

By statute, the next of kin of the deceased and their attorney are entitled to be present at the inquest. Although the deceased's next of kin did not attend the hearing, they were represented throughout by their counsel.

The statute also permits other persons "interested" in the proceedings and their attorneys to attend the inquest hearing. In the exercise of the discretion given to the Court in determining the procedures for the conduct of the inquest, the Court deemed the three Boston police officers whose weapons were fired in the incident and a representative of the Boston Police Detectives Benevolent Society to be persons "interested" in the proceedings. They attended the hearing and were represented by counsel throughout.

The evidence in the hearing was presented principally through the sworn testimony of witnesses. Each witness was called and examined in the first instance by an Assistant District Attorney. In doing so, he was not acting as a prosecutor but rather was serving as an assistant to the Court in managing an orderly presentation of the relevant evidence. He was not the proponent of any particular proposition or point of view, and indeed, in fulfilling the described function, he sometimes presented conflicting and inconsistent evidence. He called and examined witnesses who had been located by the Boston

police[1] and also witnesses who were located by counsel for the deceased's next of kin. All witnesses were sequestered, except for the three police officers who were, as interested persons, permitted to attend the entire hearing.

An inquest is an investigatory proceeding, and is neither accusatory nor adjudicatory. Kennedy v. Justice of the District Court of Dukes County, 356 Mass. 367, 373-74 (1969). Accordingly, the Court took an active role in the interrogation of witnesses. Counsel for the various "interested" persons were also given the opportunity, of which they took the fullest advantage, to question the witnesses further.

Because of the investigatory nature of the proceedings, the rules of evidence applicable to trials were not strictly observed. In general, the Court's guiding intention was to hear all evidence that was possibly relevant. Counsel were not permitted, as they would be in a trial, to object to the admissibility of evidence. As a result, the Court received evidence, such as hearsay, that would normally be excluded upon objection in an adjudicatory forum, in order to assess as completely as possible all that was relevant to its statutory task.

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[1]The evidence indicated that members of the Boston Police Homicide Division canvassed the neighborhood where the incident had occurred in an attempt to interview all potential witnesses. As a result of these efforts, the police located many witnesses whose testimony at the hearing was not entirely favorable to the police involved that night. Not only does there appear to have been no effort to screen out such witnesses, by either the police or the District Attorney's office, but rather the opposite appears to have been the case.

As noted above, there was a large volume of evidence received. The many witnesses included fourteen police officers and nineteen civilians who were present in the immediate area of the incident under inquiry.[2] Each of these witnesses had a unique vantage point, and each gave a version of the events that differed, sometimes slightly, sometimes greatly, from those given by the others. There were many different circumstances affecting the various witnesses' attentiveness and opportunity to observe the events. There were considerable conflicts and inconsistencies in the observations reported by this large group of on-the-scene witnesses.

These conflicts do not divide neatly between the police, on the one hand, and the civilians, on the other. Some police officers testified to observations different from those of other officers. Among the civilian witnesses as a group, there was wide divergence. Some gave evidence directly at odds with the evidence from other civilians. Some of the civilians testified to observations in conflict with testimony from police witnesses; others tended in their descriptions of the events to corroborate

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[2]One of the civilians present was one Richard Diggs who was a passenger in the car driven by Pate. As a result of the incident, Diggs was named a defendant in criminal complaints which were pending at the time of the hearing. Diggs was called as a witness, but he appeared with his counsel and refused to answer questions, relying on his privilege against self-incrimination. As noted below, however, the Court did receive and listen to a tape recorded interview Diggs had had with the police early in the morning of September 7, 1983.

evidence given by police officers. Some witnesses described observations that appear to be contradicted by the physical evidence.

The Court's task was to evaluate this testimony along with the other evidence in accordance with the methods generally utilized in judicial proceedings. That is, in determining the weight or credit to be given any particular testimony the Court considered such factors as the ability of or opportunity for the witness to observe the events he or she described, the witness's demeanor while testifying, the probability vel non of the testimony, and any potential interest or bias on the part of the witness.

The crucial events of the incident under inquiry took place very quickly. They also took place suddenly and without foreshadowing. Consequently, multiple impressions of sight and sound were thrust upon persons who were, in the case of all the civilians and some of the police, involuntary and unexpecting observers. It is clear from the diversity of observations testified to that these visual and auditory impressions were received, rationalized, and remembered in quite different ways.

The differences, significant as they may be, are not to be overemphasized, however. There were as well large areas of agreement among the various witnesses' testimony, and from the evidence as a whole the events can be reconstructed. In evaluating the evidence, the Court has not only considered the live testimony of the witnesses, but has also thoroughly reviewed the transcript of the testimony and each of the exhibits,

including tape recordings. From this evaluation, the Court makes findings of fact as follows.[3]

II. FINDINGS

A. Background

Eligha Pate was known to various members of the Boston Police Department for some considerable time prior to September 6, 1983. As of that date, four separate warrants had been issued for his arrest, one of them for escape from a penal institution and the other three in connection with motor vehicle larcenies. Pate was known to Boston police officers in Area B (Roxbury-Dorchester) as an experienced car thief.

He was also elusive. Several officers recounted occasions during August, 1983, when they had seen Pate driving stolen cars but had pursued him unsuccessfully. Detective Laura McCottrell alone listed eight different stolen cars that Pate had been seen driving in August. The Court listened to a tape recording of police radio transmissions made in the course of one unsuccessful pursuit in late August. The cars were usually recovered; Pate was not.

The police also had information that led them to suspect that Pate carried or had access to firearms. Two of his confederates in car thefts had been apprehended and had told the

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[3]The findings are reported in narrative form. References to specific testimony are minimized. It may be generally presumed that testimony consistent with the findings as set forth has been credited by the Court and, conversely, that testimony inconsistent with the findings has not.

police about Pate's possible connection with two recent unsolved crimes. In one, a CBS television crew had been robbed at gunpoint. Equipment and a car had been taken from them. The information given to the police suggested that Pate had been a participant in the robbery and that he might have at least one .22 caliber handgun. Some of the equipment taken from the CBS crew was later recovered in a stolen car that Pate had been seen driving.

The other unsolved crime was the daytime murder of an elderly man in a cemetery in Mattapan on August 13, 1983. The murder victim had been killed by a .22 caliber bullet. As noted above, from the information supplied by Pate's friends, police suspected that he had had possession of or access to .22 caliber weapons. The police has also found a small box containing live .22 rounds in a recovered stolen car that Pate had been driving and in which he had been chased unsuccessfully on August 19, 1983. Furthermore, a security guard at the cemetery had identified Pate from photographs as one of three young men he had told to leave the cemetery very shortly before the murder took place.

Police in Area B were advised to be on the lookout for Pate and to consider him to be possibly armed and dangerous. One of the detectives assigned to Area B prepared a flyer containing Pate's picture, listing two of the oustanding warrants and further stating, "Is believed armed and is suspect in cemetary [sic] murder." Close to a hundred of these flyers were distributed to police officers in Area B during the week of August 22. One officer testified that he recognized Pate as the driver of a stolen car he was pursuing on September 1 because he

had a copy of the flyer with him in his patrol car. In addition, during some of the stolen car pursuits in August the police dispatcher advised units in the field by radio that the operator of the car should be considered dangerous and possibly armed.

B. The Surveillance

On the evening of September 6, Sergeant Detective William Kelley of the Boston Police Auto Task Force, a unit especially concerned with car theft, met with two informants who gave him information about Pate's likely whereabouts. They told Sgt. Kelley that Pate could ordinarily be found around midnight at a certain lounge near the intersection of Blue Hill Avenue and Talbot Avenue. They further told him that if Pate was there, he would probably be driving a stolen car.

Having received this information, Sgt. Kelley, who was the supervising Auto Task Force officer for the night shift, called a meeting of all the Auto Task Force detectives on duty. At his office between 11:00 and 11:30 that night, Sgt. Kelley briefed the detectives as to Pate's identity and background. Prior to this, Pate had been known principally to police assigned to Area B. He was not well known to the members of the Auto Task Force night shift other than Sgt. Kelley, who had learned about Pate from day detectives in Area B about two weeks earlier.

Sgt. Kelley told the detectives that Pate was a known car thief, that he was wanted on multiple warrants, that he was an escapee from the Suffolk County House of Correction (Deer Island), that he was a possible suspect in the cemetery murder, that he should be considered possibly armed, and that he was

known to flee to avoid apprehension. He distributed copies of a picture of Pate. He related to the other detectives the information he had received concerning Pate's probable whereabouts that night. He instructed them to take up positions, in unmarked cars, in the general vicinity of the lounge where Pate was expected to be found, and there to await further orders.[4]

Shortly after 11:30 p.m. on September 6, members of the Auto Task force took up surveillance positions in the general area of Blue Hill Avenue, Talbot Avenue, and the American Legion Highway. Sgt. Kelley had with him in his car the two informants who had told him where Pate could probably be found. He cruised the area with them, occasionally letting one or the other out of the car to look for Pate.

The tape of police radio broadcasts that night indicates that just after 1:42 a.m. on September 7, Sgt. Kelley spotted Pate in a blue late model Cadillac, just pulling away from the curb near the lounge on Blue Hill Avenue. Sgt. Kelley had let one of his informants out of the car to look for Pate. After a few minutes, she had come running back to his car to tell him

---

[4]Two detectives who participated in the surveillance that night were not present at the meeting at Sgt. Kelley's office at headquarters. Detective Walter Robinson, who was at the time engaged with two other officers in another surveillance on the waterfront, received essentially equivalent information by telephone from Sgt. Kelley. Detective Daniel Donovan, following instructions, met Sgt. Kelley on Blue Hill Avenue and learned the information in a face to face conversation with Sgt. Kelley.

that Pate was in a dark blue Cadillac. Sgt. Kelley had then let the other informant out of his car and headed from the side street where he was to Blue Hill Avenue, where he saw the Cadillac. He notified the other units by radio, and the police began what they termed a "mobile surveillance," following the Cadillac.

In light of past experience, the police expected Pate to flee if he became aware that he was being followed. The police strategy that night was to follow him without detection until he could be maneuvered into a position where his escape would be difficult and the arrest could be made. They wanted to avoid a high speed chase as had happened in the past when Pate had been pursued by marked police cruisers. By employing a number of unmarked vehicles, the police hoped to be able to follow Pate, changing places behind him so that he would not suspect he was being followed. The following radio transmission by Sgt. Kelley that night summed up the strategy:

> Let's keep a tag on him. We'll hopscotch him. All right? And then when we figure we got him into a good position, then we'll call and make a move.

In accordance with this plan, the police began following the blue Cadillac operated by Pate, keeping in touch with each other by radio. In all, there were seven unmarked police cars and eleven plain-clothes detectives involved in the surveillance. Pate first proceeded inbound on Blue Hill Avenue, through Grove Hall, to Warren Street. He followed Warren Street to Dudley Station, then took Washington Street inbound. He turned from Washington onto Massachusetts Avenue northbound. Throughout this

route, he generally did not stop for red lights.

As the Cadillac approached the intersection of Massachusetts Avenue and Huntington Avenue, one of the detectives suggested on the radio that Pate might be headed for Cambridge. This possibility caused Sgt. Kelley to request assistance from marked police units. He gave the police dispatcher a description of the car Pate was driving, saying that it was believed stolen, and notifying the dispatcher that Pate was "really wanted." Sgt. Kelley also requested a canine unit, if one was available, saying: "It would be worthwhile to get a dog car in on this guy because he will flee."

At this point, the blue Cadillac was on Massachusetts Avenue, headed in the direction of Cambridge, between Huntington Avenue and Boylston Street. The police car next behind him was operated by Detective Walter Robinson. He was in his own personal car, a tan Corvette. Behind Robinson was Sgt. Kelley in a white Dodge. Other police units followed.

C. Events on Haviland Street

The Cadillac turned left from Massachusetts Avenue into Haviland Street. Haviland Street is a relatively short street that runs between Massachusetts Avenue and Hemenway Street, one block from Boylston Street. From Massachusetts Avenue, it proceeds parallel to Boylston for 380 feet, then bends to the north at about a 45° angle and runs 92 feet to Hemenway Street. Approximately halfway between Massachusetts Avenue and the bend, Haviland Street is intersected from the south by Edgerly Road. Across from Edgerly Road is a parking lot accessible by a

driveway at either end. The parking lot is bounded on the north by the rear of buildings facing on Boylston Street. To the west of the intersection with Edgerly, Haviland is flanked by apartment buildings, with even numbers on the south and odd numbers on the north side of the street. Haviland is a one-way street in the direction of Hemenway. Parking is permitted only on the even-numbered side of the street. In the early morning of September 7, there were cars parked all along the even-numbered side of Haviland street. There were no cars parked on the odd-numbered side of the street.

Following the Cadillac, Robinson also turned into Haviland Street. Sgt. Kelley followed Robinson. The Cadillac proceeded a short distance down the street, pulled over to the right and stopped. Robinson, not wanting to give away that he was following the Cadillac, continued slowly down the street past where the Cadillac had pulled over.[5] Sgt. Kelley, seeing the

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[5]The detectives testified that they thought Pate, in stopping his car, was testing to see if he was being followed. Earlier one of the detectives had noted on the radio, "He's looking out the window here behind him. So he's really looking." That may have been the case, but Richard Diggs, Pate's companion in the car, suggested another reason Pate pulled over. In a taped interview given to police at about 4:30 that morning, Diggs said that Pate had told him "he wanted to go check on one of his girls." The questioning continued:

> Q. Now did he check on any of the girls (at Haviland Street)?
>
> A. When he went to look, he said, "Where's this girl? Where's this girl?" And that's when the cop pulled up.

This suggests that Pate was as yet unaware that he had been followed by the police.

Cadillac stop and also not wanting to give himself away, turned right into the driveway to the parking lot, as if he were going to park his car.

After Robinson had driven by the Cadillac, he himself pulled over just beyond the bend in Haviland and parked on the odd-numbered side of the street facing Hemenway Street. The Cadillac started from the curb and again drove toward Hemenway. Seeing this, Sgt. Kelley backed out of the driveway he had half-entered and again got behind the Cadillac.

Meanwhile, other detectives who had been part of the surveillance had moved to try to intercept Pate from the other end of the street. Detective Kenneth Acerra, with his partner Detective Robert Cunningham, went up Massachusetts Avenue to Boylston Street, left on Boylston, left against the traffic on Hemenway, and left again, also against the traffic, onto Haviland Street. They were followed, in the same route, by a car containing Detectives John Crowley and Robert Buccafusca. A little bit later, a car driven by Detective Daniel Donovan and one driven by Detective Robert Kenney with Detective William Lydon followed the same route, but these were unable to turn into Haviland Street because it had been by this time blocked off by two marked police cruisers. Finally, a car driven by Detective Tommy Montgomery with Detective Jose Garcia turned into Haviland from Massachusetts Avenue, behind Sgt. Kelley's car.

As Acerra drove down Haviland the wrong way toward Massachusetts Avenue, he passed Robinson's car, which was parked just to the Hemenway Street side of the bend in Haviland. He saw

the Cadillac coming towards him, and maneuvered so that his car stopped, driver's door to driver's door, beside the Cadillac, now also stopped, in front of 15 Haviland Street. Acerra spoke through the open driver's windows in the two cars to Pate, the operator of the Cadillac, and said, "You're on a one-way street." According to Acerra, Pate replied, "I know. I'm sorry." (It was Acerra, of course, who was going the wrong way on the one-way street.)

Sgt. Kelley, behind the Cadillac, was stopped in front of 13 Haviland Street. Robinson, as Acerra passed him, got out of his car, figuring that the routes of escape for the Cadillac were now cut off and the time had come to make the arrest. He walked back from his car toward the Cadillac, holding his service revolver in his right hand and his badge in his left. He elevated his left hand, extending the badge toward the Cadillac. He looked at the driver and said, in effect, "Police. Stop the car." Robinson testified that Pate was looking directly at him when he issued that command. According to Acerra, after his exchange with Pate about the one-way street, Pate looked away from him toward the direction of Robinson, then suddenly backed up the Cadillac straight back toward Massachusetts Avenue.

But Sgt. Kelley's car was in the way. The Cadillac stopped and came straight forward again, striking Acerra's car head-on, bumper to bumper. The Cadillac swung backward again, the front end moving to the right, the back end to the left. At this point, Detective Cunningham got out of the passenger side of the car driven by Acerra. At approximately the same time, Detectives Crowley and Buccafusca were getting out of their car, behind

Acerra. Acerra and Kelley both stayed behind the wheels of their respective cars. Donovan, Kenney and Lydon had not yet arrived. Montgomery and Garcia were behind Kelley.

After moving backward, the Cadillac came forward again, its left front fender striking and damaging the left front fender of the car occupied by Acerra. Cunningham now tried to go around behind the Cadillac to approach the passenger's side. He did not draw his gun. As he got near the back of the Cadillac, the car went backward again. Cunningham was struck by the left rear of the Cadillac and knocked to the ground. He rolled over to get out of the way of the moving car. Acerra, seeing Cunningham fall out of sight, moved his car back. He thought the Cadillac either had or was about to run over Cunningham. Having hit Cunningham, the Cadillac continued back, striking and damaging a parked car.

Crowley was now walking in the street toward the Cadillac, just behind Robinson. He drew his revolver. Buccafusca was in the street on the passenger side of his car, behind Acerra's. The Cadillac, angled across Haviland with its left rear fender smashed into a parked car, revved its engine and, with a squeal of tires, came forward again. As it came, it headed directly where Robinson and Crowley were in the street. They ran toward the sidewalk and the cement stairs in front of 15 Haviland Street to get out of its path. When the car kept coming at them, both men, running backwards across the sidewalk and up the stairs, fired their guns at the driver of the car. Buccafusca, from the street, took aim and fired one shot at the driver. Each testified he shot at the driver in an attempt to stop the

progress of the car. Robinson and Crowley said they feared they were going to be run over or crushed against the building. Buccafusca said he feared Robinson and Crowley were going to be struck by the car.

As the shots were being fired, the Cadillac went up over the curb, crossed the sidewalk, and smashed into the steps where Robinson and Crowley had retreated. The collision had sufficient force to do substantial damage to the front of the car and to dislodge a cement retaining wall adjacent to the steps.

In all, the police fired eleven shots. Crowley and Robinson fired five each, and Buccafusca fired one. No other officers fired their weapons at any time that night.

At some point while Crowley and Robinson were firing, Pate opened the door of the Cadillac, jumped out and ran around the back end of the car toward Massachusetts Avenue. Acerra testified that he saw the driver's door open and Pate start to get out when the car was going up over the curb, before it hit the steps. Robinson and Crowley also thought they saw the door open as the car was coming forward.[6]

All of the civilian witnesses were attracted to their vantage points in the various buildings by sounds they heard. Many had been asleep and were awakened by noises. Others were

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[6]Robinson and Acerra each reported this in separate confidential statements given to the police Internal Affairs Division early on September 7. The reports had been filed, according to Deputy Superintendent Stephen DeLosh, who collected them by six o'clock a.m. on September 7. This was about four hours after the incident.

reading or listening to music when their attention was drawn to the street below. The sounds that interrupted their sleep or other pursuits varied. Some heard first the screeching of tires, some first heard the sound of an automobile crash, and some first heard the gunshots. Some heard shots before a crash; some heard a crash before shots; some heard shots and a crash together; some heard shots only and no crash. Every one who reported hearing a crash, whether or not it had been preceded by shots, reported hearing shots after the crash. This evidence supports the conclusion that the shooting, which the Court is satisfied began before the car struck the building, continued after the collision.

The Cadillac itself was struck by six of the eleven shots. Two struck the windshield in the lower corner of the driver's side. One struck the driver's door just forward of the external rear-view mirror and ricocheted into the mirror. One struck the post at the rear window on the driver's side, shattering the window. One struck the bottom of the driver's door and the panel just below it. One struck the left rear quarter panel above the wheel.[7]

At least two of the shots struck the car before the driver's door was opened. This can be determined because two bullet marks occur in places on and near the driver's door that would have been shielded if the door were open but which would have been exposed if it were closed. Physical examination of the car also indicates that at least one of the bullets struck the car before

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[7] There was no evidence to suggest that any shots were directed toward the passenger's side of the car.

it hit the steps. When the car hit the steps, the hood buckled, raising it to a position in front of one of the bullet marks. With the hood thus buckled, that mark could not have been made as it was. This evidence corroborates the testimony that the shots began to be fired before the car struck the steps. There was other testimony that no shots were fired until after the car had crashed. The physical evidence contradicts this to the extent that it suggests that at least one shot was fired before the crash.

It did not take very long for the shots to be fired, probably less than five seconds. They began as the car came forward with the driver's door closed. They continued as the car crashed into the wall and as Pate opened the driver's door and jumped out.

As Pate left the car, it is likely that he wheeled to his left. He ran straight to the rear end of the Cadillac, turned to his left and ran down the middle of Haviland Street toward Massachusetts Avenue. He ran fast. As he started to run past the driver's side of Sgt. Kelley's car, still in the road in front of 13 Haviland Street, Sgt. Kelley swung the door open, striking Pate and causing him to stumble. Sgt. Kelley grabbed him with one hand, but Pate struggled free of his grasp and continued toward Massachusetts Avenue.

At this point, Detectives Montgomery and Garcia, further down Haviland, saw Pate running toward them. Montgomery drew his revolver, pointed it at Pate and ordered him to stop. Pate

veered away from Montgomery and was grabbed by Garcia and then by Montgomery. Kelley and Buccafusca arrived almost immediately, having chased Pate on foot down the street. The four men wrestled Pate to the ground, face down, where after a brief struggle he was handcuffed.[8]

During the struggle, Pate's jersey was raised from his pants and the officers noticed a small puncture wound on his right flank just above the waist. Sgt. Kelley immediately called for an ambulance, which arrived shortly thereafter.

Because Pate was lying face down, the wound that the police officers had seen was the one that the emergency medical technicians (EMTs) first saw and paid attention to. Because of its location, they feared possible involvement of the spinal cord. Accordingly, they did not immediately move him, but rather first put on a neck brace and then placed him on a long back board to immobilize his back. It was only after they rolled him over onto the board that they discovered a bullet wound in the chest. Prior to this, no one had seen the chest wound. It was

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[8]Several civilians testified that during the struggle, Pate appeared to have been beaten. Their testimony varied. Some said he was kicked, but not punched. Some said he was punched, but not kicked. Some others said that while they watched he was neither kicked nor punched. The police acknowledged struggling with him, and Detective Garcia stated that at one point he put his foot on Pate's shoulder to keep him down. The civilian witnesses also disagreed as to whether Pate had simply fallen down by himself or whether he was intercepted and wrestled down. Some were emphatic that he fell, with no one around him. Others said he was captured, held from behind and kneed in the groin. There was physical evidence of bruising which would be consistent with his having received a blow to the groin area. The officers who said they captured him, particularly Montgomery and Garcia who were facing him, denied administering such a blow. In any event, the medical evidence was clear that this injury, however caused, did not contribute to his death.

not apparently bleeding externally, because even after he was moved, there was no evidence of blood on the street where he had lain. The wound was dressed, and he was taken to the Brigham and Women's Hospital. He was conscious en route and struggled rather strenuously with an EMT as he lay in the ambulance. Efforts of the surgeons to save his life were unsuccessful, and he was pronounced dead at 3:12 a.m.[9]

It is significant to note how quickly all these events occurred. The tape of police radio transmissions that night indicates that the Cadillac driven by Pate turned from Massachusetts Avenue into Haviland Street at 1:51:35 a.m. When Pate was intercepted by Garcia and Montgomery, after the action in front of 15 Haviland, a resident in one of the apartment buildings on Haviland, having heard gunshots and having looked out to see men struggling in the street below, called the police emergency 911 telephone number. That call was recorded as having been made at about 1:52:40. Thus from the time Pate's car first turned into Haviland Street to the time he was seized by Garcia and Montgomery, only slightly over a minute had elapsed. The intervening events - the stopping and starting, the verbal exchange with Acerra, the maneuvering of the car, the shots, the crash, the running, and the apprehension - all took place in that short period of time. The police tape indicates that Sgt. Kelley called for an ambulance at 1:54; the ambulance arrived, according to its log, at 1:56.

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[9]There was no evidence to suggest that the medical attention given Pate, either by the EMTs or the surgeons, was other than of the highest quality.

D. Autopsy

An autopsy was performed on the body of Eligha Pate, Jr. in the afternoon of September 7 by George G. Katsas, M.D. the Suffolk County Medical Examiner. Dr. Katsas testified at the inquest, and his report was received in evidence.

The autopsy revealed that Pate had been struck by five bullets. In all, there were eight bullet wounds in his body. Of the eight, five were entrance wounds and three were exit wounds. That is, three bullets had entered, passed through, and left the body. Two bullets had entered and remained in the body; one of these was removed in surgery at the hospital, the other by Dr. Katsas during the autopsy. The location of the wounds and the paths of the bullets in the body were found to be as follows:

Wound #1[10] An entrance gunshot wound, 0.8 cm. in diameter in the right lower front chest wall, described more particularly as located over the right costal margin approximately 4 cm. to the right of the xiphoid process of the sternum.

Wound #2 An entrance gunshot wound, 0.8 cm. in diameter, on the left upper abdominal quadrant at the vertical plane of the nipple and a little below the left costal margin.

Wound #3 An exit gunshot wound, 1.0 cm. in diameter, on the right lumbar region a little above the iliac crest. (This is the wound on the right rear flank first noticed by the police as Pate lay face down on the street.)

Wound #4 An entrance gunshot wound, approximately 1.0 cm. in diameter, on the right hip, laterally, at the level of the bone known as the great trochanter.

Wound #5 An exit gunshot wound, approximately 1.0 cm. in diameter, on the front midsurface of the right thigh.

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[10]The numbers assigned to the wounds is for descriptive purposes only and is not intended to indicate the sequence in which the wounds were received. That is unknown.

Wound #6 An entrance gunshot wound, 0.8 cm. in diameter, on the distal posterior surface of the right thigh. (This bullet grazed the femur and was found by Dr. Katsas just above the right knee.)

Wound #7 An entrance gunshot wound, 0.8 cm. in diameter, on the lateral surface of the right lower leg a little above the midpoint between the knee and the ankle.

Wound #8 An exit gunshot wound in the posterior surface of the right lower leg a little higher than Wound #7.

The bullet that entered the right lower chest through Wound #1 passed through the cartileges of the right costal margin, contused the right lung, and perforated the right ventricle of the heart and the left lung. Its path was somewhat right to left. The bullet was removed by surgeons at the Brigham and Women's Hospital from the pleural cavity.

The bullet that entered through Wound #2 passed through the abdomen without damaging any vital organs and exited through Wound #3 on the right flank. Its path was somewhat left to right.

The bullet that entered through Wound #4 on the right hip passed through the right leg and came out through Wound #5 on the front midsurface of the thigh. Dr. Katsas observed a bullet track through the soft tissues and muscles of the right thigh.

The bullet that entered through Wound #7 at the right front of the right lower leg exited at Wound #8 on the back of the right lower leg.

In summary, there were three bullets that struck Pate from the front and traveled toward the back: Wound #1 in the right chest, Wound #2 in the left upper abdomen, and Wound #7 in the

right lower leg. There were two bullets that struck him from the back and traveled toward the front: Wound #4 in the right hip and Wound #6 in the right thigh.

The bullet that entered through Wound #1 in the right chest and perforated the lung and heart was the fatal bullet.[11] In Dr. Katsas's opinion this wound, and only this wound, caused the death of Eligha Pate, Jr. Dr. Katsas testified that if Pate had received all the other wounds but this one, his death would not have resulted. Similarly, his death would have occurred if he had received this wound and no others. In other words, none of the wounds or injuries Pate received that night contributed to his death except the wound from the bullet that entered through the right chest and pierced the left lung and heart.[12]

E. Ballistics Evidence

The two bullets removed by the surgeons and by Dr. Katsas were forwarded to the police ballistics unit for examination. The ballistics unit had received four other bullets that had been recovered. Two had been recovered from the Cadillac itself. One

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[11]Dr. Katsas also testified that it was not unusual in his experience that a young man in good physical condition, having received such a wound, could run as much as a full city block before the loss of blood was sufficient to incapacitate him.

[12]The Pate family arranged for a private autopsy to be performed by a Dr. Baden from New York. Dr. Katsas testified that he knew Dr. Baden well as a professional colleague and had conferred with him after both autopsies had been performed. He reported that Dr. Baden concurred in his findings. In light of this testimony the Court determined, without demurrer from any counsel, that it would be unnecessarily duplicative to call Dr. Baden from New York to testify.

of these was found embedded against the post on the driver's side of the windshield next to an area of shattered glass. The other was embedded against a post next to the rear door window on the driver's side. Two others had been recovered from the street. One was found next to the Cadillac, the other next to the row of cars parked along the even numbered side of Haviland in the area approximately faced by the back end of the Cadillac.

The ballistician also had the twelve guns that had been surrendered by the detectives that night.[13] Upon examination, he determined that three had been fired (those issued to Detectives Buccafusca, Crowley and Robinson) and that the rest had not. He test-fired each of the weapons that had been fired that night and then compared the test-fired bullets under a microscope with the six bullets that had been recovered. He was able to match four of the spent bullets with a specific gun. Two, the one from the Cadillac's left rear window and the one found in the street next to the Cadillac, had been too badly distorted to permit comparison.

The bullets recovered from the windshield, from the street near the parked cars, and from Pate's right knee had been fired from the gun of Detective Walter Robinson.

The bullet recovered by the surgeons at the Brigham and

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[13]Following the incident, all the detectives involved in the surveillance surrendered their revolvers to the Police Internal Affairs Division. There were only eleven detectives present at the scene. Detective Robinson's usual partner, Detective Roland Bird, who was not there that night, nevertheless surrendered his gun for examination. It had not been fired.

Women's Hospital, the fatal bullet, had been fired from the gun of Detective John Crowley.

III. CONCLUSIONS

Under the law of the Commonwealth, a police officer is authorized to employ deadly force to the extent reasonably necessary to protect himself or another from an imminent danger of death or serious bodily harm. See Commonwealth v. Harrington, 379 Mass. 446, 450 (1980). Under certain circumstances, deadly force may also be justifiably employed by an officer attempting to overcome resistance to make a lawful felony arrest. See Commonwealth v. Young, 326 Mass. 597, 602 (1950); Commonwealth v. Klein, 372 Mass. 823, 832 n.8 (1977); Julian v. Randazzo, 380 Mass. 391, 396 (1980).

The present incident occurred in the course of an attempt by the police to arrest Pate for a felony (larceny of a motor vehicle).[14] The detectives involved that night had been advised that Pate had been known to flee to avoid apprehension and that he should be considered possibly armed and dangerous. Before any shots were fired, Pate had disregarded a command of a police officer to stop his car and had struck with his car both Detective Cunningham and the car occupied by Detective Acerra. Against this background, when the car drove directly toward

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[14]There were outstanding warrants for Pate's arrest for this felony. In addition, the police had a reasonable belief that Pate was operating a stolen car that night. The evidence established that the car was in fact stolen.

Detectives Crowley and Robinson, they reasonably could have believed, as they said they did, that they were under attack and in imminent danger of being struck by the on-coming Cadillac. They reasonably could have believed, as they said they did, that they could not have avoided the danger without attempting to stop the vehicle's progress by firing their weapons at the Cadillac's driver. Similarly, Detective Buccafusca could reasonably have perceived the imminent danger to Crowley and Robinson and concluded that force was necessary to avert it.

As noted above, the physical damage to the car indicates that the shooting began with the driver's door closed and the vehicle moving ahead. Thus, it can be concluded that the police first shot at Pate while he was behind the wheel operating the car. He was not struck by any bullets, however, while he remained seated in the car. While the shots were being fired, Pate apparently opened the door and fled from the car.

The evidence of the location of the wounds in Pate's body and the identification of some of the bullets to particular guns, considered with testimonial and other physical evidence, supports the conclusion that Pate was struck by the bullets as he left the driver's seat of the Cadillac and began to turn, to his left, to flee. In so doing, he first exposed the front of his body to the shots coming from Robinson and Crowley on the stairs at 15 Haviland Street even before he was completely out of the car. It is probable that at this point he received the fatal wound to his chest, and the other wounds to his abdomen and lower right le The fatal bullet, striking the right chest and traveling to the

heart and left lung, followed a path consistent with a slight leftward turning motion by him, where the bullet was fired from the front of the car. As Pate continued turning to run, he was struck by two bullets, one entering the right hip and passing out the top of the right thigh and the other entering the back of the right leg and remaining near the knee, neither of which contributed to his death.

The credible evidence does not support the conclusion that Pate was shot at after he had begun running from the back of the Cadillac toward Massachusetts Avenue. It is clear that ten of the eleven shots fired came from the guns of Robinson and Crowley, who were located on the stairs in front of the Cadillac. They were not in position to fire in the direction of Massachusetts Avenue in the manner described by some witnesses. Moreover, the physical evidence from the Cadillac confirms that those shots were directed toward the Cadillac from the front and along its left or driver's side. Likewise, two civilians positioned in windows across the street in a more or less direct line with the Cadillac as it faced the steps at 15 Haviland testified independently that the shots they saw were aimed directly at the car. Furthermore, any shots aimed directly down Haviland toward Massachusetts Avenue, as described by some witnesses,[15] would have been fired toward the positions of Sgt. Kelley and Detectives Montgomery and Garcia at rather close quarters, Kelley's car having been only a short distance behind

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[15]Their testimony was contradicted by other civilian witnesses.

the Cadillac. Not only would it be unlikely that the police would have shot in the direction of other police officers in these circumstances, there was no physical evidence supporting this possibility.

Crowley and Robinson each fired a volley of shots. Under the circumstances, it was reasonable for them not to trust in the efficacy of a single shot to halt the car. As noted above, many witnesses - including police - reported hearing shots after a crash. The Court concludes that some of the shots fired by Crowley and Robinson were fired after the Cadillac had hit the building. The number of such shots and the span of time in which they were fired cannot be precisely determined. Nor can it be determined from the evidence whether the fatal shot was fired before or after the car crashed, although there was evidence that Pate was partly out of the car before it hit the steps.

Robinson and Crowley acknowledged that some shots may have been fired after the moment of the actual collision of the Cadillac into the building. Each testified, however, that as soon as he was aware that Pate was outside the car and running in the opposite direction, he ceased firing. Robinson said he first saw Pate outside the car at the left rear door running away, and at that time he pulled his gun up and stopped firing. He testified that in the stress of the moment, he thought that he had only fired three shots. He had actually fired five, all the shots in his gun. Crowley also said he stopped firing when he saw Pate running away near the back of the car. Crowley had also fired five shots, but he had one remaining in his six-shot

revolver. This suggests that he made a conscious decision to suspend firing. Buccafusca said he fired once at the driver while the car was in motion but that after the collision, believing that Crowley and Robinson were no longer in danger, he fired no further shots and began to chase Pate on foot.

This testimony from the officers can be believed or disbelieved. The Court had given it close and careful scrutiny, mindful that these men are likely motivated to justify their actions. Such scrutiny had included close observation of the witness's demeanor while testifying and an assessment of the plausibility of the testimony, both internally and in comparison with other evidence.

The Court accepts the testimony of Detectives Buccafusca, Crowley and Robinson that they fired their weapons at the driver of the Cadillac in an attempt to stop the car as it drove directly, and apparently deliberately, at Crowley and Robinson, and further that they did not fire at the driver once they had perceived him in retreat outside the car.

The Court finds that the Cadillac, after striking Cunningham and the car occupied by Acerra, drove with accelerating speed directly at Crowley and Robinson, that Crowley and Robinson ran for the safety of the stairs at 15 Haviland Street, that as they did so they were fearful that the Cadillac coming over the sidewalk toward them would crush them against the building, that they fired point blank at the driver as they stumbled backwards up the stairs, that Buccafusca had fired his only shot before the car hit the steps, that the Cadillac struck the stairs and the driver jumped out as the volley of shots was being fired, that

the mortal wound was inflicted as Pate was getting out of the car and before he had completely turned to run, and that after he had turned at the end of the Cadillac and run toward Massachusetts Avenue all the shots had been fired.

Therefore, the Court reports, in accordance with its statutory mandate, that it appears that the deceased Eligha Pate, Jr., met his death as the result of a gunshot fired by John J. Crowley, who was acting under a reasonable apprehension of imminent danger of death or serious bodily harm and was employing reasonable force under all the circumstances to avert that danger. It does not appear that the death of the said Pate was the result of an unlawful or negligent act by any person.

By the Court,

George A. O'Toole, Jr.
Associate Justice

Dated: November 23, 1983